

CUK-HO 4813-12-LP1804

THE
BENGAL LAW REPORTS

OF

DECISIONS OF THE HIGH COURT AT FORT WILLIAM,
[CIVIL AND CRIMINAL]
IN ITS ORIGINAL AND APPELLATE JURISDICTIONS;
PRIVY COUNCIL DECISIONS ON INDIAN APPEALS;
ORDERS AND RULES OF THE HIGH COURT;
REVENUE CIRCULAR ORDERS.

EDITED BY J. V. WOODMAN, MIDDLE TEMPLE

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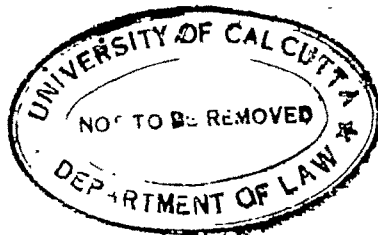
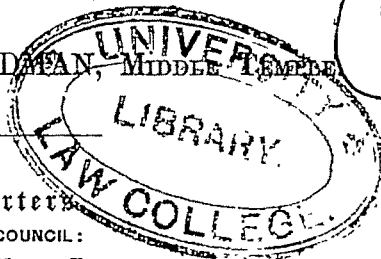
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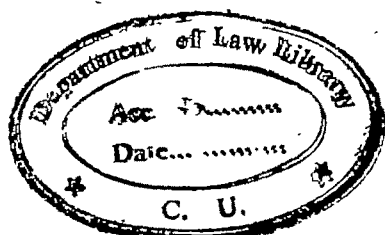
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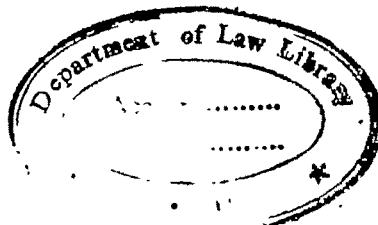
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12

JUDGES OF THE HIGH COURT.

HON'BLE SIR RICHARD COUCH, *Knight, Chief Justice.*

„ F. B. KEMP,

„ L. S. JACKSON,

„ J. B. PHEAR,

„ A. G. MACPHERSON,

„ W. MARKBY,

„ F. A. B. GLOVER,

„ D. MITTER (deceased),

„ C. PONTIFEX,

„ W. AINSLIE,

„ E. G. BIRCH,

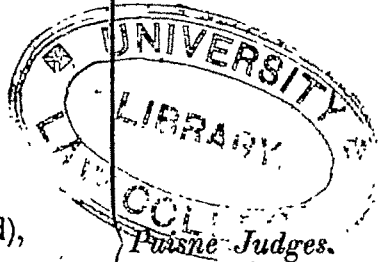
„ G. G. MORRIS,

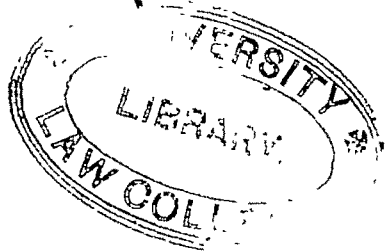
„ R. C. MITTER,

„ W. F. McDONELL,

MR. PAUL, *Officiating Advocate-General.*

„ KENNEDY, *Standing Counsel.*





ERRATA AND CORRIGENDA.

- Page 76, line 12 from bottom, *for* "dismissed" *read* "decreed."
- " 76, line 8 from bottom, *for* "plaintiff" *read* "defendant."
- " 109, line 5 from bottom, *for* "merts" *read* "merits."
- " 113, line 13 from top, *for* "have" *read* "bear."
- " 143, line 10 from bottom, *after* "of" *insert* "an."
- " 143, foot-note (2), *for* "2 Moore's I. A." *read* "7 Moore's I. A."
- " 145, line 15 from top, *for* "wast" *read* "was."
- " 167, second line of heading, *omit* dash after "67," *and put* "Indian Councils Act, 1861" *in brackets.*
- " 171, line 15 from bottom, *for* "1859" *read* "1857."
- " 177, foot-note (2), *for* "594" *read* "613 note."
- " 189, first line, *for* "country" *read* "courtyard."
- " 191, second column of foot-note, line 8 from top, *for* "preferred" *read* "prefixed."
- " 197, line 4 from top, *for* "1860" *read* "1866."
- " 210, head-note, last line but one, *for* "incorporal" *read* "incorporeal."
- " 486, foot-note (5), line 2 of heading, *for* "5" *read* "105."
- " 489, foot-note (7), line 3 of heading, *for* "VI" *read* "VIII."



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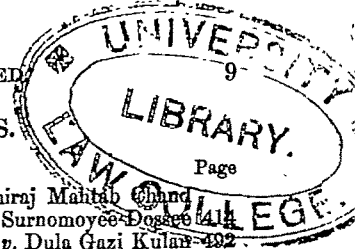
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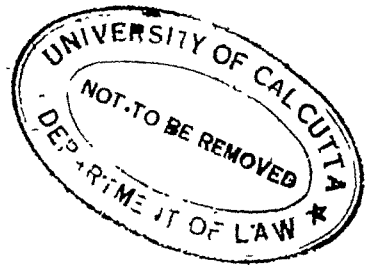
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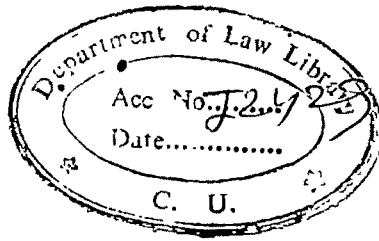


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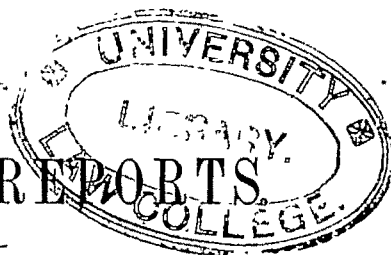
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ORIGINAL CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Pontifex.

GANENDRO MOHUN TAGORE v. RAJAH JUTTENDRO MOHUN
TAGORE BAHADOOR AND OTHERS.

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April 18, 21
to 26, § 28.
May 19, 26
to 28, § 81.

*Will—Proviso for Cesser—Condition—Conditional Limitation—Breach
of Condition.*

P C T, a Hindu, died leaving an only son *G M T*, and having first made his will in English, whereby, after declaring that he had already made sufficient provision for his son *G M T*, and that *G M T* was to take nothing under the will, he gave all his property to trustees, upon trust, as to the personal estate, "to collect and get in the same" with certain specified exceptions, and thereout to pay his funeral expenses and debts "and such legacies as were not by the will postponed in payment;" and to invest the residue, and out of the annual proceeds of such investments, so far as the same would extend, to pay certain annuities and postponed legacies as they became due, and to pay such surplus income as might from time to time exist to the person entitled to the beneficial enjoyment of the real property, or the surplus rents or profits thereof; with an ultimate trust, after all the legacies and annuities had been satisfied, for the person or persons entitled to the beneficial enjoyment of the real property. And as to the realty, upon trust, until all the debts and legacies had been paid, and all the annuities had fallen in, to receive the rents, and thereout in the first instance to pay the unsatisfied legacies and annuities, and to pay the surplus rents to the person or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And, as a first charge on the net income of the real property (after satisfying the expenses of establishments), the testator directed the trustees to pay Rs. 30,000 per annum to the person for the time being entitled to the beneficial enjoyment of the real property or the surplus income thereof. He further directed them, after all the annuities and legacies had fallen in and been satisfied, to convey the real estate, so far as the then condition of circumstances would permit, unto and to

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the use of the person entitled, under the limitations contained in the will, to the beneficial interest therein. The first limitation was to *J M T* for life. At the end of the limitations of the real estate, the will contained the following proviso :—

“Provided always, and I hereby declare that, if any devisee, or tenant-for-life . . . shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakhana* house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed,” as if the person committing breach of such conditions had then died.

The testator died in August 1868. In December 1868, his son *G M T* instituted a suit for the purpose of avoiding and setting aside the trusts and limitations of the will, except so far as they were for payment of debts, legacies, and annuities. This suit was dismissed on the 1st of April 1869. *G M T* appealed, and on the 1st September 1869, the Appeal Court declared him to be absolutely entitled to the personalty, subject to the trusts for payment of debts, legacies, and annuities, and entitled on the death of the defendant *J M T*, the tenant for life, to the realty. *J M T*, and others claiming under the limitations in the will, appealed to the Privy Council; and *G M T* filed a cross-appeal in which he claimed that the gift of the life-estate to *J M T* ought to be declared void. By the order of Her Majesty in Council, which was dated the 9th of August 1872, and which arrived in Calcutta in September 1872, all the limitations after the limitation to *J M T* were declared void and inoperative, and it was further declared that *J M T* was beneficially entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made, and to the provisions in the will not thereby declared to be void; and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the net rents of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that, upon the failure or determination of *J M T*'s life-interest, *G M T* was entitled as heir-at-law to the real and personal property. The proviso for ceaser was not among the provisions of the will which were declared void. *J M T* was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *baithakhana* house: and *J M T*, who had a family dwelling-house of his own, used, up to November 1869, to attend at the *baithakhana* daily for the transaction of business. In November 1869 *J M T* quarrelled with his co-trustees, and

ceased to go to the *baitkhana*. In April 1870 he demanded from the other trustees that possession of the *baitkhana* should be given to him, and upon their insisting on the right to occupy the portion of the *baitkhana* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession; and the trustees were ordered to deliver to him possession of the *baitkhana*, except the portion of the ground-floor occupied for the business of the estate. After obtaining this decree, *J M T* found that the *baitkhana* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J M T*, in December 1871, brought a suit to compel them to effect necessary repairs: the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun which were completed in October 1872.

In a suit by *G M T* alleging that *J M T* had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the *baitkhana* house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage:

Held that the clause containing the provisions for cesser and shifting of the estate was intended to come into operation as a whole, and not piecemeal, and, therefore, that until *J M T* came into full beneficial enjoyment of the life-estate given him by the will, or at all events until he became entitled to the surplus rents, the time had not arrived when that clause was intended to apply.

Held further that, assuming that such time had arrived, the action of the plaintiff in contesting the right of *J M T*, under the will, to occupy the *baitkhana* house and premises, debarred him from claiming that effect should be given to the clause of forfeiture for non-residence. Even apart from any action by the plaintiff, the conduct of the trustees in disputing the right of *J M T* to possession of a portion of the *baitkhana* house, and refusing to repair, would suspend the operation of the forfeiture clause until October 1872, inasmuch as it prevented him until that time from obtaining such a possession as was contemplated by the forfeiture clause. The forfeiture clause was not brought into operation by the judgment and order of the Judicial Committee of 9th August 1872.

Held on the evidence that *J M T* had complied with the conditions as to residence.

PROSONO COOMAR TAGORE, a Hindu, died on the 30th August 1868, having made a will in the English language, whereby, after declaring that he had already made such provision for his

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son Ganendro Mohun Tagore (the plaintiff, who had become a Christian in his father's lifetime) as he, the testator, considered sufficient, and that Ganendro Mohun Tagore would take nothing whatever under the will, he gave all his property to Romanath Tagore, and the defendants Rajah Juttendro Mohun Tagore, Woopendro Mohun Tagore, and Doorga Persaud Mookerjee, upon trust, as to the personalty, to pay his funeral expenses, debts, and certain annuities, and such legacies as were not postponed by the will, and to pay the surplus unexpended of the interest and annual proceeds to the person or persons for the time being entitled under the will to the beneficial enjoyment of the testator's real estate, and after the annuities and legacies had fallen in and been satisfied, to stand possessed of the trust moneys in trust absolutely for such last-mentioned person or persons; and as to the realty, or immoveable property in the nature of realty, upon trust until the debts and legacies had been paid, and the annuities had fallen in, to receive the rents, and to apply the same, in the first instance, in aid of the income of the personalty in payment of debts, legacies, and annuities, and to pay the residue to the person or persons entitled under the will to the beneficial enjoyment of the real estate, for the absolute use of such person or persons respectively; and the will desired the trustees to hold the real estate for the use of such last-mentioned person or persons; and that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real estate should receive Rs. 2,500 a month, and that the annuities and legacies should be paid gradually out of the balance with interest at 5 per cent. And the trustees were directed:—

“So soon as all the legacies and annuities have fallen in and been fully satisfied, to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then condition of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without

infringing upon or violating any law against perpetuities which may then be in force and apply to the said real estate, or the conveyance or settlement of it as last aforesaid (if any such there shall be)."

The testator devised his real property as follows:—

"I give and devise (subject always to the devise to the said Romanath Tagore, Juttendro Mohun Tagore, Woopendro Mohun Tagore, and Doorga Persaud Mookerjee) all the real property of what particular tenure, nature, or kind soever, and also library, horses, carriages, farmyard, furniture of the *baithakhana*, jewels, gold and silver plates, &c., which I shall at the time of my death be possessed of or entitled to, to and for the following uses and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Juttendro Mohun Tagore for and during the term of his natural life."

Then, after certain limitations over, and provisions with reference thereto, came the following proviso:—

"Provided always, and I hereby declare that, if any devisee or tenant-for-life, or entail, or otherwise, or any person entitled to take as heir by descent, or adoption, or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakhana* house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed, as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government revenue, or so ceasing to keep up in a due state of repair and to use as his residence my said *baithakhana* house, had then died."

The testator appointed the above named trustees executors of his will. It was, however, proved only by the defendants Juttendro Mohun Tagore, Woopendro Mohun Tagore, and Doorga Persaud Mookerjee. Romanath Tagore neither proved it, nor intermeddled with the estate.

On the 17th December 1868, the present plaintiff, as the

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testator's heir-at-law, sued to have it declared that the provisions of the will, so far as it sought to create the life-estate and estates in remainder, were void. The original decree passed by Phear, J., in that suit was varied on appeal by Peacock, C.J., and Norman, J. (1), and cross-appeals having been preferred from the last-mentioned decree to Her Majesty in Council, the Judicial Committee, on the 9th August 1871, declared, amongst other things (2), that Juttendro Mohun Tagore was beneficially entitled to a life-interest under the will in the real or immoveable property, and also in the personal or moveable property vested in the trustees, subject to the payments by the will directed to be made, and to the provisions of the will not thereby declared to be void, and also until the legacies and annuities fell in and were satisfied, to receive Rs. 2,500 a month out of the net rents, and also the surplus rents of the realty, and the surplus of the interest and annual profits of the personalty remaining unexpended after the payments by the will directed to be made thereout, and also that, subject to the trusts for payment of legacies and annuities, Juttendro Mohun Tagore was beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture, jewels, gold and silver plate, and other articles belonging to the testator, except the jewels, household furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will were not to be got in or sold by the trustees and executors; and that the limitations over after the life-interest of Juttendro Mohun Tagore had failed and were void; and that, upon the failure or determination of such life-interest, the plaintiff Ganendro Mohun Tagore, subject to the provisions in the will not thereby declared to be void, was entitled as heir-at-law of the testator to the real and personal estate, in respect of the receipt and enjoyment of which the life-interest of Juttendro Mohun Tagore was declared, and that upon the expiration of such life-interest and subject to any trust not thereby declared to be void, the beneficial interest in the real

(1) See the report in 4 B. L. R.,
O. C., 103.

(2) See the report in 9 B. L. R.,
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in the house, jewels, and gold and silver plate in the will referred to; that he had removed the residue of the gold and silver articles to his family dwelling-house, and that he had, also in conjunction with his co-trustees, sold the horses and carriages in the will referred to. In his written statement the plaintiff stated that, about the close of the year 1869, the defendant Rajah Juttendro Mohun Tagore altogether ceased to go to the *baithakhana* house in any capacity whatever. The plaint proceeded to allege that, on the plaintiff giving notice to the defendant Rajah Juttendro Mohun Tagore of his intention to bring the present suit, the latter, on the 14th October 1872, "made an evasive show of entry and residence in the said *baithakhana* house." The plaint prayed that it might be declared that, under the terms of Prosono Coomar Tagore's will, the interest of the defendant Rajah Juttendro Mohun Tagore in all the testator's estate ceased on or about the 15th January 1869, and that from that date the plaintiff was entitled, subject to the legacies and annuities referred to in the order of the Judicial Committee, to the whole of the testator's estate; that, subject as aforesaid, the absolute possession of the whole estate might be decreed to the plaintiff as heir-at-law, or at least that the absolute interest in the library, horses, &c., or in the proceeds thereof, had vested in the plaintiff as the person next in succession. The plaint also prayed for an account, for a receiver, and for an injunction restraining the defendants from receiving or collecting any of the rents or profits of the estate, or from parting with any of the personal property. The defendant Rajah Juttendro Mohun Tagore in his written statement submitted that the plaint disclosed no cause of action; that the proviso for forfeiture was vague, invalid, incapable of being carried into effect, and inconsistent with, and repugnant to, the ordinary incidents of the estates to which it was attempted to be annexed; that the will contained no condition or limitation over which expressly or impliedly would divest the defendant of the estate vested in him and vest the same in the plaintiff; that the plaintiff's construction of the will, the limitations after the determination of the defendant's life-estate having been declared to be void, would operate by way of an implied devise over in favor of the plain-

tiff as heir-at-law, so as to defeat the express direction of the testator that the plaintiff should take nothing whatever under the will; and that the proviso could in no case operate before the time appointed for the conveyance of the property, or before all the legacies and annuities should have been paid, or while the estate remained vested in the trustees. He alleged that the legacies and annuities had not been wholly paid off, and that the estate had not been conveyed to him, but was still vested in the trustees; that the *baithakhana* house was not built in such a manner as to allow a Hindu gentleman to use it as a family residence, and that the testator himself never used it as such; that the word *baithakhana*, as applied to a house, meant a house for the reception of, and entertainments to, male visitors, and for the transaction of business; that the testator until he became a widower took his family meals and passed his nights in his ancestral family dwelling-house, and never introduced any of his female relatives into the *baithakhana* house; and that he must have intended the defendant to use it in the same way as he himself had done before he became a widower; that, in fact, the house could not be made suitable for the residence of Hindu ladies without great expense, and such extensive alterations and additions as would entirely change its character and make it unsuitable for a *baithakhana*, and that without such alterations and additions the defendant's female relatives could not, without doing violence to the customs and usages obtaining in respectable classes of Hindu society in Bengal, live in the *baithakhana* house, as the testator well knew; that the defendant, who, as the testator knew, was a married man living with his family, had used the *baithakhana* as his residence for the like purposes for which the testator had used it before he became a widower, and had till the end of 1869, when the differences between him and his co-trustees began, gone to the *baithakhana* daily and had transacted business and received his friends and other persons there; that his residence in the upper floors having become unsafe in consequence of the non-repair of the premises, he had been compelled to bring the suit for repairs already mentioned; that after the decree in that suit, owing to the trustees' delay, he had himself begun the repairs

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in June 1872; that they were completed in November of that year, and that from the middle of October, so soon as the house had been made fit for use, he had gone into occupation with the *bonâ fide* intention of using it as intended by the testator; that he had, according to the provisions of the will, selected for his own use and retained and used the best and most useful portion of the testator's jewellery and gold and silver plate, and had, according to the direction of the will, permitted the executors to sell the remainder, the sale proceeds of which had been placed to the credit of the estate; that he had only removed the furniture, &c., of the *baithakhana* during the repairs, and had taken it back to the *baithakhana* on the completion of the repairs; that he had sold such of the furniture as had become old or broken, and replaced it by new furniture bought at his own expense; that the executors had sold such of the carriages and horses as had become unfit for use, and had credited the sale proceeds to the testator's estate; that he had retained and used one carriage and a pair of horses, and that he had purchased a new carriage and a pair of horses which, together with other horses belonging to him, were kept in the stables attached to the *baithakhana*.

The trustees filed a written statement in which, whilst admitting the sales complained of, they stated that the proceeds had been credited to the testator's estate, and submitted that they had been guilty of no breach of trust.

Mr. *Wood*, Mr. *Evans*, and Mr. *Macrae* for the plaintiff.

The *Advocate-General*, offg. (Mr. *Paul*), Mr. *Kennedy*, Mr. *Woodroffe*, and Mr. *Bonnerjee* for Rajah Juttendro Mohun Tagore.

Mr. *Ingram*, Mr. *Branson*, and Mr. *Phillips* for the trustees.

Mr. *Wood*.—The trustees took only a chattel interest, and subject to that interest the tenant-for-life has the freehold—*Carter v. Barnadiston* (1), *Sir Andrew Corbet's* case (2), *Guavarra's* case mentioned in *Manning's* case (3), *Corda's* case (4), *Goodtitle v. Whitby* (5), *Haddelsey v. Adams* (6), *King v.*

(1) 1 P. Wms., 509.

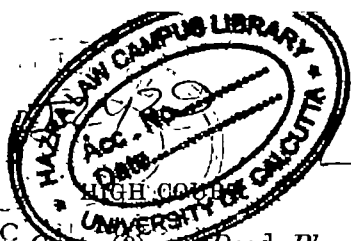
(2) 4 Co., 81.

(3) 8 Co., 94, at p. 96.

(4) 1 Cro. Eliz., 316.

(5) 1 Burr., 228.

(6) 22 Beav., 266.



Denison (1), *Nash v. Cooke* (2), and *Doe d. Player v. Nicholls* (3).

It was necessary to have an express condition to compel the tenant-for-life to repair, 2 Co. Inst., p. 299. The condition bound him to repair—*Hibbert v. Cooke* (4), *Powys v. Blagrove* (5), *Gregg v. Coates* (6), *Dent v. Dent* (7), and *Dunne v. Dunne* (8). The proviso is perfectly clear, and is not void for repugnancy. It is valid according to Hindu law. Macnaghten's Considerations, pp. 356 and 375, referring to the wills of Rajah Nobkissen and Rasbeharry Surmono, *Soorjeemoney Dossee v. Denobundoo Mullick* (9), 2 Colebrooke's Digest, Bk. ii, ch. iv, v. 62; 2 Macnaghten's Hindu Law, Cases xv, xxi, xxix, xl, and xlvii, at pp. 223, 230, 237, 247, and 255, the Vyavashta in the note to *Ram Narayun Dutt v. Mussamut Sut Bunsee* (10), Vivada Chintamani, p. 83, *Madubchunder Banerjea v. Bamasoon-dree Debea* (11), and *Sonatun Bysack v. Sreemutty Juggut-soondree Dossee* (12), Vyavashta Darpana, 2nd ed., p. 606, *Chattar Lal Sing v. Shewukram* (13), and the judgment of Peacock, C.J., in *Tagore v. Tagore* (14). By English law, a condition must be construed according to the intention of the testator. A proviso for cesser, whether it be treated as a condition or limitation, can determine a life-estate, Rolle's Abr. Condition E. 6, and in the same words, 5 Viner's Abr. Condition E. 6; *Wellock v. Hammond* (15), *Rochford v. Hackman* (16), and *Haswell v. Haswell* (17). The onus of proving the impossibility of performance is on the defendant Rajah. If the condition was broken there is a resulting trust to the plaintiff as heir-at-law, Lewin on Trusts, pp. 115—119. Equity will not relieve the defendant from the effect of his omission to repair—*Hillier v. Parkinson* (18). Uncertainty as to his posi-

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(1) 1 Ves. & B., 260, at p. 272.

(2) 3 B. & Ad., 839.

(3) 1 B. & C., 336.

(4) 1 Sim. & St., 552.

(5) 1 Kay, 495.

(6) 23 Beav., 33.

(7) 30 Beav., 363.

(8) 3 Sm. & Gif., 22.

(9) 6 Moore's I. A., 526, at p. 550.

(10) 3 Sel. Rep., 377, at p. 380.

(11) S. D. A., 1853, 102.

(12) 8 Moore's I. A., 66, at p. 89.

(13) 5 B. L. R., 123.

(14) 4 B. L. R., O. C., 103, at p. 192.

(15) Cro. Eliz., 204.

(16) 9 Hare, 475, at pp. 480, 481.

(17) 28 Beav., 26.

(18) 9 L. J. Ch., O. S., 156.

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tion is no excuse—*Job v. Banister* (1). Apparently the only excuse admitted by Hindu law for the non-performance of an act agreed to be performed, is where performance has been prevented by the act of God or the king; see the texts on the return of deposits, 2 Colebrooke's Digest, Bk. ii, ch. i; and Macnaghten's Considerations, 389, 390, 395. An estate taken on condition is taken on agreement to perform the condition, 21 Hen. VII, p. 12, *Lord Ewre v. Strickland* (2), and *Attorney-General v. Christ's Hospital* in 1790 (3), and again in 1831 (4), which shows further that the condition must be performed even though performance entail loss on the grantee; see also *Gregg v. Coates* (5), and *Chauncy v. Graydon* (6). If part only of a condition be or become impossible, the other part must be performed—*Davis v. Cary* (7). The case of *Lancashire v. Killingworth* (8), *Eaton v. Laughter* (9), and *More v. Morecomb* (10) appear to be opposed to this view, but see Com. Dig. Condition D. 1. The obligor's negligence is no excuse, Com. Dig. Condition L. 6. As to residence, see *Cooper v. Edgar* (11), *Butler v. Goodale* (12), and *Walcot v. Botfield* (13). The defendant Rajah neither visited nor kept an establishment at the *baithakhana* house—*Wilkinson v. Allot* (14), *Canning v. Newman* (15), Co. Litt. 42a, *The King v. The Inhabitants of Easington* (16), *Macdougall v. Paterson* (17), *Lambe v. Smythe* (18), *Massey v. Burton* (19), *Kerr v. Haynes* (20), *The King v. Sargent* (21), *The King v. The Duke of Richmond* (22), *Doe d. Shaw v. Steward* (23), *The King v. The Inhabitants of Aberystwith* (24), *The King v. Mitchell* (25), *Whithorn v. Thomas* (26), *Fillingham v.*

(1) 26 L. J. Ch., 125.

(2) Cro. Jac., 240.

(3) 8 Br. Ch. Ca., 165.

(4) Tamlyn, 393.

(5) 23 Beav., 33.

(6) 2 Atk., 616.

(7) 15 A. & E., 418.

(8) 12 Mod., 529.

(9) Cro. Eliz., 398.

(10) *Id.*, 864.

(11) Winch, 115.

(12) 6 Co., 21.

(13) 1 Kay, 534.

(14) Cowp., 429.

(15) 2 Brownl., 54.

(16) 4 T. R., 177.

(17) 21 L. J., O. P., 27.

(18) 15 M. & W., 433.

(19) 27 L. J. Ex., 101.

(20) 29 L. J., Q. B., 70.

(21) 5 T. R., 466.

(22) 6 T. R., 560.

(23) 1 A. & E., 300.

(24) 10 East., 354.

(25) *Id.*, 511.

(26) 7 M. & Gr., 1.

Bromley (1), *Dunne v. Dunne* (2), *Wilkinson v. Wilkinson* (3), and *Wynne v. Fletcher* (4). The action of the trustees creates no disability, *Fraunces'* case (5), Com. Dig. Condition M. 5; and Rolle's Abr. Condition N. As to the meaning of the term "cease," see *Doe d. Duke of Norfolk v. Hawke* (6).

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Mr. *Evans* on the same side (7).—The clear intention of the testator was that the *baithakhana* house should be tenanted from time to time by the person beneficially interested, and the will itself shows that the testator contemplated a cesser while the estate was in the trustees. In the possessory suit, and again in the suit for repairs, the defendant Rajah asserted that his estate was defeasible in case of non-residence, which is inconsistent with his present contention that the house is unsuited for his residence: and in the possessory suit it was declared that it was not inconsistent with the trusts of the will that he should enter into possession of the whole house. In *Sidney v. Wilmer* (8), the trustees were empowered to enter and let the mansion-house. [PONTIFEX, J.—Here the trustees have a general power of leasing. The proviso for the assumption of the name and arms of the testator in that case is analogous to the proviso for residence here. Having regard to *Davies v. Lowndes* (9), can you contend that the defendant Juttendro was bound to reside while the administration suit was pending, and it was uncertain whether he took anything under the will?] In that case no time was limited within which Lowndes was to assume the name of Selby: here the testator evidently intended the tenant-for-life to commence to reside as soon as he took a beneficial interest. As to when

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| (1) 1 T. & Russ., 530. | on either side according to the old |
| (2) 3 Sim. & Gif., 22; S.O. on appeal, | practice on the equity side of the Su- |
| 7 DeG. M. & G., 207. | preme Court, Macpherson, J., stated |
| (3) L. R., 12 Eq., 604. | that the Court would hear a second |
| (4) 24 Beav., 430. | Counsel on either side to sum up the |
| (5) 8 Co., 92. | evidence. Mr. Evans accordingly now |
| (6) 2 East., 481. | addressed the Court, evidence for the |
| (7) The Advocate-General having | plaintiff having been taken. |
| applied that the evidence might first | (8) 4 De G. J. & S., 84. |
| be taken, and then two Counsels heard | (9) 1 Bing. N. C., 597. |

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the condition should be performed, see 2 Swinb. on Wills, p. 533. It is sufficient for the plaintiff to show that the condition has not been complied with; the Court ought not to go further and to enquire whether on defeasance the whole intention of the testator can or cannot be carried out; see *Egerton v. Earl Brownlow* (1). The Hindu law, like the Roman—as to which see the *Corpus Juris Civilis*, *Fendorum*, Lib. ii, Tit. 75—only deals with the simplest kinds of conditions; and in construing such conditions, elementary principles must be applied. As to the nature of conditional limitations, and who can take advantage of them, see 2 Swinb. on Wills, p. 495; 1 Jaffman on Wills, pp. 823 to 825, citing *Jackson v. Noble* (2), and *Doe d. Blomfield v. Eyre* (3). [PONTIFEX, J.—In *Rochford v. Hackman* (4), the principle is stated that the Court must look at the intention of the testator, and that if the limitation over does not meet the event which has occurred, the testator must have intended the prior estate to continue.] The cases there cited by Turner, V.C., show his meaning to have been that, in order to see whether the event has occurred, the limitation over must be looked at. If this proviso for cesser be viewed as a condition, the plaintiff is entitled to enforce it; if it be viewed as a conditional limitation, he is entitled to take advantage of the limitation over since that expressed by the testator is illegal.

The *Advocate-General* for Rajah Juttendro Mohun Tagore.—

(i.) The forfeiture clause cannot take effect until the estate has vested by conveyance from the trustees, or at least by the receipt of the surplus rents. (ii.) Having regard to the testator's knowledge of Juttendro's position and the nature of a *baitha-khana* house, the testator could not have intended such a residence as is contended for by the plaintiff. (iii.) The proviso is indefinite and ambiguous. (iv.) Even if not so, the estate is absolute, and cannot be divested by a gift over which cannot take effect. The testator's intention cannot be split and effect be given to the forfeiture clause while the declaration that the plaintiff shall take nothing under the will is wholly disregarded:

(1) 4 H. L. Ca., 1, at p.
(2) 2 Keen., 590.

(3) 5 O. B., 718.
(4) 9 Hare, 475.

under the order of the Privy Council, the plaintiff does not take under, but against, the will. In other portions of this will, the testator uses the expression "person 'beneficially entitled,'" whereas in the forfeiture clause the person subject thereto is described as the "devisee or tenant-for-life," &c., which shows that the clause was not intended to take effect until the trustees had conveyed the estate free from all legacies to the tenant-for-life. The clause has already received judicial construction in the suit for possession: that judgment binds the plaintiff. There is no difference between this case and *Sidney v. Wilmer* (1), as the trustees have full power to let the house. Non-repair by the trustees during the time the estate remains in their hands would not work a forfeiture as against the defendant, why then should non-residence? The conditions cannot be taken distributively since the words are "shall cease to keep up in a due state of repair and to use as his residence," not "or to use." The defendant Juttendro is not yet in the position of tenant-for-life; the Privy Council declare that he takes a life-interest, not a life-estate: he may never get a life-estate in the strict sense of the term: the cases, therefore, as to a tenant-for-life being bound to repair, do not apply. At common law a tenant-for-life was not liable for waste, 2 Co. Inst., p. 299; 2 Wm. Saund., p. 252. The clause was inserted to provide for the time when the estate had been conveyed by the trustees. *Gregg v. Coates* (2) and *Dent v. Dent* (3) do not apply.

The meaning of the word "residence," as used by the testator, must be gathered from surrounding circumstances—*The Attorney-General v. Drummond* (4), *Fonnereau v. Poyntz* (5), and *Lytton v. Lytton* (6). As to the effect of the house not being fit for the residence of Hindu ladies, see *Wilkinson v. Wilkinson* (7). After commenting on the evidence as showing the nature of the residence required by the testator, the learned Counsel contended that the conditions in the forfeiture clause being conjunctive, and

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(1) 4 DeG. J. & S., 84.

(2) 23 Beav., 33.

(3) 30 Beav., 363.

(4) 1 Dru. & War., 353.

(5) 1 Br. Ch. Ca., 472.

(6) 4 Br. Ch. Ca., 441.

(7) L. R. 12. Eq., 604.

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not disjunctive, there must be a breach of all to work a forfeiture—*Graves v. Bainbrigge* (1). Conditions for forfeiture must be strictly construed—*Jones v. Suffolk* (2). *Clavering v. Ellison* (3), affirmed in Dom. Proc. (4), *Schnell v. Tyrrell* (5), and *Campbell v. Brownrigg* (6). An absolute interest cannot be destroyed by a gift over unless the gift over can itself take effect, *Green v. Harvey* (7), *Ring v. Hardwick* (8), *Ridgway v. Woodhouse* (9), and *Doe d. Blomfield v. Eyre* (10) ought not to be followed. [PONTIFEX, J.—In *Robinson v. Wood* (11), Kindersley, V.C., followed it very reluctantly; it was approved of by Lord St. Leonards in the last edition but one of his work on Powers, but in the last edition several cases are noticed which decided the other way, Sugden on Powers, p. 512.] There are no peculiar rules of construction applicable to Hindu wills—*Rewun Persad v. Mussamut Radha Beeby* (12) and *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (13). As to the distinction between a condition and a conditional limitation, see Watkins on Conveyancing, 8th ed., p. 233. This proviso must be regarded as a conditional limitation, but the object of a conditional limitation is to create a new estate on breach of the condition, and if the new estate cannot be created, the condition does not take effect.

No case has been cited to show that the Hindu law admits of conditions subsequent: the nearest approach to one is that mentioned in the Vyavashta in the note to *Ramnarayan Dutt v. Mussamut Sut Bunsee* (14). The cases are summed up in the Vyavashta Darpana, 2nd ed., p. 601. The notion of Hindu law is that the gift does not enure till all the conditions have been fulfilled, not that the gift is divested on failure to perform the conditions annexed to it; see Stokes' Hindu Law Books, pp. 133 and 188. A term which never existed could not possibly cease,

(1) 1 Ves., 562.

(2) 1 Br. Ch. Ca., 528.

(3) 3 Drew., 451.

(4) 7 H. L. Ca., 707.

(5) 7 Sim., 86.

(6) 1 Phill., 301.

(7) 1 Hare, 428.

(8) 2 Beav., 352.

(9) 7 Beav., 437.

(10) 5 C. B., 713.

(11) 4 Jur., N. S., 625.

(12) 4 Moore's I. A., 137, at p. 173.

(13) 6 Moore's I. A., 526, see p. 550.

(14) 3 Sel. Rep., 380.

per Parke, B., in *Quiche v. Leach* (1). *Doe d. Duke of Norfolk v. Hawke* (2) makes for the defendant. The suit for possession showed an *animus revertendi*. In *Dunne v. Dunne* (3) there was a refusal to reside. *Wynne v. Fletcher* (4) was not argued, and no reasons are given for the judgment. The term "residence" is ambiguous—*Attenborough v. Thompson* (5), *Maclaren v. Stainton* (6), *Walcot v. Botfield* (7), and *Fillingham v. Bromley* (8). "An indefinite or general expression is universal, unless there is something in the context to the contrary," *per* Willes, J., in *Whitechurch v. East London Railway Co.* (9): applying that rule the defendant has not been shown to come within the operation of the forfeiture clause. Assuming, however, that non-residence has been proved, the action of the trustees was a lawful and sufficient excuse for it. The time when the residence was to commence is not limited, as to which see *Davies v. Lowndes* (10).

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Mr. *Kennedy*, on the same side.—The breach of condition is wrongly alleged: the word used by the testator was "cease," whereas the breach alleged is "neglect," which is far wider. In addition to the cases mentioned by the Advocate-General, the learned Counsel cited *The Attorney-General v. Dakin* (11), as to the meaning of "cease;" *W. v. B.* (12), as to the necessity of construing the condition strictly; *Kampf v. Jones* (13), *Carver v. Bowles* (14), and *Lassence v. Tierney* (15), for the proposition that an absolute gift cannot be taken away by a gift over where the gift over cannot take effect, and the *Vyavashtha Darpana*, p. 637, for an instance of an apparently conditional gift, a narrow consideration of which, however, showed that the gift was not complete. [PONTIFEX, J.—If there has been a forfeiture, the next person

(1) 13 M. & W., 218, at p. 228.

(2) 2 East., 481.

(3) 3 Sm. & Gif., 22.

(4) 24 Beav., 430.

(5) 2 H. & N., 559.

(6) 27 L. J. Ch., 442.

(7) 1 Kay, 534.

(8) 1 T. & Russ., 530.

(9) L. R., 7 Ex., 424, at p. 436.

(10) 1 Bing. N. C., 597.

(11) L. R., 4 H. L., 338.

(12) 11 Beav., 621.

(13) 2 Keen., 756.

(14) 2 Russ. & M., 301.

(15) 1 Mac. & G., 551.

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in succession who was in existence at the testator's death, and not the heir-at-law, would take. The Privy Council only declared the limitation over after the life-estate void as being too remote, but the forfeiture must occur in the defendant's lifetime. There is a springing use: the trusts of the will are executory, and there is a direction to convey on a certain event. The conveyancer knowing the decision of the Privy Council, would omit the void limitations, so that the forfeiture would not necessarily accrue to the benefit of the heir-at-law.] The attention of the Privy Council was wholly directed to the determination of the life-interest by the death of the tenant-for-life; the effect of a forfeiture during his lifetime was not considered. Where several contingencies are embodied in one clause, the Court may sever them—*Evers v. Challis* (1). Suppose this were the last of a chain of limitations, the conveyancer could not insert the limitation over, as there is no person who could take under it. *The Attorney-General v. Christ's Hospital* (2) was a case of quasi-contract rather than of condition. *Stone v. Parker* (3), though apparently in conflict with *Maclaren v. Stainton* (4), really leaves that case untouched. The plaintiff has set up an affirmative case which he has failed to prove; his suit should, therefore, be dismissed.

Mr. Wood in reply.—The defendant Juttendro was discharged from the trusteeship on his own application, and thereby prevented himself from checking the payment of Government revenue; that alone might entail a forfeiture if the revenue were not paid, 5 Vin. Abr., pp. 247 and 252, *Doe d. Davies v. Davies* (5). Juttendro had an immediate estate by implication—*Sidney v. Wilmer* (6), *Graves v. Bainbrigge* (7), *Cave v. Holford* (8), *Wainewright v. Wainewright* (9), and *Philipps v. Chamberlaine* (10). He sued for and obtained possession as tenant-for-life, and as

(1) 7 H. L. Ca., 531.

(6) 4 DeG. J. & S., 84.

(2) 3 Br. Ch. Ca., 165; and
Tamlyn, 393.

(7) 1 Ves., 562.

(3) 29 L. J. Ch., 874.

(8) 3 Ves., 650.

(4) 27 L. J. Ch., 442.

(9) *Id.*, 558.

(5) 16 A. & E., 951.

(10) 4 Ves., 51.

such he is under an obligation to reside and to repair; see *Bostock v. Blakeney* (1), *Nairn v. Marjoribanks* (2), *In re Skingley* (3), *Colthirst v. Bejushin* (4), and *Southey v. Lord Somerville* (5), as to repairs, and *The King v. The Inhabitants of North Curry* (6) as to the nature of the residence required. Evidence of the testator's intention as to the use of the *baithakhana* is inadmissible—*Judd v. Pratt* (7). Whatever the original meaning of the word *baithakhana* might have been, it is now used indefinitely, just as we use “abbey” in England. A conditional limitation is a liberal construction put on a condition in order to effectuate the testator's intention, 2 Swinb. on Wills, p. 496 *et seq.*, and the cases there cited, which show that, if the person who was intended to take advantage of the condition cannot do so by law, the heir shall come in; see further *Joel v. Mills* (8), *Russel v. Buchanan* (9), *Doe d. Gill v. Pearson* (10), *Sherrard v. Lord Harbrough* (11), and *Morice v. The Bishop of Durham* (12). Equity protects the heir-at-law and will raise a trust in his favor where the limitation intended to defeat him cannot take effect—*Henchman v. The Attorney-General* (13). If the Court treat the forfeiture clause as a nullity, because the person meant by the testator to take after Juttendro upon breach of condition cannot take, it will give Juttendro a larger estate than the testator intended. Where effect cannot be given to the whole of the testator's intention, that intention must be carried out as far as possible—*Thellusson v. Woodford* (14), *Pickering v. Lord Stamford* (15), *Rundale v. Eeley* (16), and *Ex parte The Earl of Ilchester* (17). The words “tenant-for-life” in the forfeiture clause must be construed in the ordinary sense—*Holloway v. Holloway* (18). As to what are grounds of relief

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(1) 2 Br. Ch. Ca., 653.

(2) 3 Rus., 582.

(3) 3 Mac. & G., 221.

(4) Plow., 21.

(5) 13 Ves., 486.

(6) 4 B. & C., 953.

(7) 13 Ves., 168, at p. 174.

(8) 3 K. & J., 458.

(9) 2 Cr. & M., 561.

(10) 6 East., 173.

(11) 1 Amb., 165.

(12) 9 Ves., 399.

(13) 3 M. & K., 485.

(14) 4 Ves., 227, at p. 325.

(15) 3 Ves., 492.

(16) Carter, 170.

(17) 7 Ves., 348, at p. 369.

(18) 5 Ves., 399, at p. 401.

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from forfeiture, see *Peachy v. The Duke of Somerset* (1), 2 Jarm on Wills, p. 13, *Lord Beanlien v. Lord Cardigan* (2), and *Andrew v. Trinity Hall* (3). The pendency of litigation was no excuse for the defendant's non-residence—*Rosse v. Pye* (4). As to wilful refusal to reside being necessary, see *Gregory v. Wilson* (5).

The learned Counsel distinguished the cases cited on behalf of the defendant Juttendro.

Cur. adv. vult.

The judgment of the Court was delivered by

PONTIFEX, J.—This case, which has been argued at great length before us, depends mainly upon the construction which ought to be placed upon portions of the will of the late Prosono Coomar Tagore, who died in the month of August 1868. The testator in the year 1827 separated in estate, food, and worship from his brothers. In October 1862 he executed his will; and he subsequently executed two codicils (neither of them material to the issue in this suit), the latter of which bears date the 23rd of March in the year in which he died. It appears from the will and codicils that the testator left an only son, Ganendro Mohun Tagore, a grandson by his eldest daughter who had died, a second daughter who was a childless widow, and a third daughter who had children and grandchildren living at the testator's decease.

For his only son, the plaintiff in this case, the testator made no provision by his will; declaring therein that he had already made for his son such provision as he considered sufficient, and that the son should take nothing whatever under his will.

The testator in his will stated the income of his property in October 1862, the date of his will, to be upwards of Rs. 2,50,000, and to be steadily increasing. But he subsequently withdrew from the operation of his will, and, as in the third codicil mentioned, otherwise settled part of his property.

(1) 2 Wh. & Ta., 979.

(4) Yelv., 207.

(2) 2 Amb., 533.

(5) 9 Hare, 683.

(3) 9 Ves., 525.

It does not appear what was, at the testator's death, the amount of the income of the property which passed by the will.

By the will, which was in English, the testator gave all his property whatsoever to four trustees, upon trust, as to the moveable property (in the will called personal estate), "to collect and get in the same (except such jewels, household furniture, books, and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in his real estate, or the income or surplus income arising therefrom, should wish to retain for his or their own use), and thereout to pay his funeral expenses and debts" and such legacies as were not by the will postponed in payment; and to invest the residue, and out of the annual proceeds of such investments, so far as the same would extend, to pay the annuities and postponed legacies as they became payable; and to pay such surplus income as might from time to time exist to the person entitled to the beneficial enjoyment of the real property, or the surplus rents or profits thereof; with an ultimate trust, after all the legacies and annuities had been satisfied, for the person or persons entitled to the beneficial or absolute enjoyment of the real property. And as to the immoveable property (in the will called real property), upon trust, until all the debts and legacies had been paid, and all the annuities had fallen in, to receive the rents, and thereout in the first instance to pay the unsatisfied legacies and annuities, and to pay the surplus rents to the person or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And as a first charge on the net income of the real property (after satisfying the expenses of establishments), the testator directed his trustees to pay Rs. 30,000 per annum to the person for the time being entitled to the beneficial enjoyment of the real property or the surplus income thereof. And the testator directed that the various annuities and postponed legacies should, with interest, be gradually discharged out of the net rents, after payment of the Rs. 30,000 per annum. And it was not until after all the annuities and legacies had fallen in and been satisfied that the testator directed his trustees to convey his real property to what would in English law

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be called the uses of the settlement subsequently by the will directed to be made, and then only so far as the then condition of circumstances would permit. The testator next proceeds to give numerous annuities and legacies of large amount to his daughters and their children and grandchildren. Among other considerable legacies, there is a direction to accumulate in Government securities such a sum as would produce Rs. 12,000 per annum as an endowment for the Tagore Law Professorship.

It does not appear what was the total amount of the legacies given by the will and codicils, but it does appear in evidence that the legacies, not to speak of the annuities, have not yet been satisfied; and it was in fact admitted that there is at present no surplus income.

After the bequest of the legacies and annuities, the will purports to devise (subject to the interest or estate previously given to the trustees) all the testator's real property, "library, horses, carriages, farmyard, furniture of the *baithakkhana*, jewels, gold and silver plate," &c., to uses in strict settlement, under which males only should take, and their estates should be inalienable. Under these uses the first limitation was to the defendant Juttendro Mohun Tagore for and during the term of his natural life. All the subsequent limitations have been declared by the order of Her Majesty in Council inoperative and void.

At the end of the limitations of the real estate, the will contains the following proviso, on which the plaintiff has based this suit:—(*His Lordship read the proviso for cesser; see ante, p. 5.*)

The plaintiff in this case claims that the defendant Juttendro (whom in this judgment we shall call "the defendant," although the trustees are also defendants to the suit) has committed a breach of some or one of these conditions, and has thereby incurred a forfeiture of which the plaintiff is entitled to take advantage. By the prayer in his plaint, the plaintiff claims that such forfeiture extends to the Rs. 30,000 per annum. Assuming that the plaintiff, as heir-at-law of the testator, is entitled to take advantage of any breach in the observance of the conditions,

it is necessary that we should state shortly the circumstances which have occurred since the death of the testator.

The testator died in August 1868. On the 17th December 1868 the plaintiff instituted a suit, and by his plaint submitted that the trusts and limitations in the will, except so far as they were for the payment of debts, legacies, and annuities, were wholly void and inoperative; and he prayed (*inter alia*) that it might be declared that the testator had no absolute power of disposition by will of his entire estate, particularly the ancestral estate, to the exclusion of the plaintiff, and that the plaintiff as heir-at-law was entitled to the same. On the 1st of April 1869, a decree was made dismissing this suit, but giving the plaintiff costs out of the estate. Against that decree the plaintiff appealed, and, on the 1st of September 1869, the Appellate Court by its decree declared that, subject to the trusts for the payment of debts, legacies, and annuities, the plaintiff was absolutely entitled to the personalty or moveable property, and in effect that he was entitled, as the testator's heir-at-law, after the death of the defendant, to the immoveable property. Against this decree the defendant and others claiming under the limitations in the will appealed to Her Majesty in Council. At first the plaintiff did not appeal against the decree of the 1st of September 1869, but he subsequently obtained from the Judicial Committee special leave to appeal, and in his cross-appeal he claimed that the gift by the will of the life-estate to the defendant ought to be declared void and inoperative.

The order of Her Majesty in Council is dated the 9th of August 1872; and it was thereby declared that the defendant Juttendro was beneficially entitled to a life-interest under the will in the immoveable property, and also in the moveable property directed to be conveyed or converted into a fund respectively subject to the payments in the will directed to be made, and to the provisions of the will not thereby declared to be void; and also, until the legacies and annuities fall in and are satisfied, to receive Rs. 2,500 per month out of the net rents of the immoveable property, and also the surplus rents of the same and the surplus interest of the moveable property; and that upon the failure or determination of the life-interest

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of the defendant, the plaintiff was entitled as heir-at-law to the real and personal property. The order also contained a direction that the whole of the costs of all parties as between attorney and client should be paid out of the estate; the effect of which order will be to postpone or affect in some degree the enjoyment of the life-interest given to the defendant.

The plaintiff having thus, from December 1868 until August 1872, persisted in asserting that the defendant was not entitled to a life-estate (and consequently not to residence in the *baitha-khana* house and premises), and that, in fact, all the provisions in the will, except for legacies and annuities, were void; on the 18th of November 1872 completely changed front, by instituting the present suit, and thereby insisting that the intentions of the testator as appearing in the will ought to be rigidly enforced, and that, under one of the provisions in the will, the defendant had forfeited that life-estate to which, by the order of Her Majesty in Council, he had been declared entitled.

The issue raised in this suit, and which we have to try, is in our opinion mainly a question of construction depending but very slightly upon evidence; but at the desire of the parties, and upon an intimation from them, expressed with much frankness, that, whatever may be our decision, the case will certainly be carried on appeal to England, we have interfered but little with the conduct of the case, though, in our opinion, most of the evidence was superfluous and unnecessary. We must say however now, as we said more than once during the argument, that, for the construction of this will, the will of a Hindu, the multitude of quotations from the Year Books, Abridgments, Digests, and Institutes, was altogether irrelevant, and beside the question.

The questions which really arise in the suit may be classed under three heads:—

1st.—Has the time arrived when the clause containing the provisions for cesser and shifting the estate was intended to apply?

2ndly.—If that time has arrived, does that clause now apply?

- (1) having regard to the proceedings taken by the plaintiff;
- (2) having regard to the conduct and proceedings of the trus-

tees; (3) having regard to the judgment of the Judicial Committee, and the order of Her Majesty in the original suit.

3rdly.—If the clause applies, what was the nature or quality of the residence intended by the testator; and has the defendant by his conduct committed a breach of the conditions so as to incur a forfeiture?

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The first question is purely one of intention to be gathered in the four corners of the will, and to be decided as if the limitations in the will were all valid, and the person in remainder next after the life-estate was suing for a declaration that the tenant-for-life had incurred a forfeiture, and that in consequence thereof the estate had shifted.

The clause of cesser and shifting use contains three separate conditions:—

(1). Permitting any part of the property to be sold for arrears of the Government revenue.

(2). Ceasing to keep in repair.

(3). Ceasing to use as a residence;—the subsequent words “requiring the use of the library,” &c., being in our opinion indications of the quality of residence, rather than separate conditions.

Now, although it may well be that these three conditions are so separable that a breach of any one of them might cause a forfeiture, they are not, in our opinion, so separable that we can consider that the testator intended them to come into operation, at different times; as for instance, that residence should be indispensable, although the conditions of discharging the Government revenue and the cost of repairs had not commenced to operate. On the contrary we think that the clause was intended to come into operation as a whole, and not piecemeal.

Assuming this to be the case, we proceed to consider what is the nature of these conditions. Under the first and second of them the residence in the *baithakhana* would be saddled with liabilities of very serious importance, which the testator must have known would, for some years after his death, change what we must presume he intended to be a benefit into a most oppressive burden. We learn from the will that the Government revenue of only a portion of the estate was

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Rs. 40,555-13-3 per annum (and the evidence shows that the total Government revenue was over Rs. 60,000 per annum); we know from the statement of the annual income of his property in the will, and from the very considerable amount of the annuities and legacies given by the will, that the first person beneficially interested under the limitations could expect for some years after the testator's death to receive only Rs. 30,000 per annum under the will; and we know as a fact from the evidence that the defendant has not yet received more than Rs. 2,500 per mensem. We think that obviously it could not have been the testator's intention that the person whom he describes in the gift of the Rs. 2,500 per mensem as the person entitled to the "beneficial enjoyment" of the surplus rents of his real property, should be saddled with a liability to pay Rs. 60,000 per annum, while receiving only Rs. 30,000 under the will, or at all events before becoming entitled to the surplus rents. To hold a contrary opinion would be to impute to the testator a very cruel irony when he described the nature of such an interest as a beneficial enjoyment.

But it is said that for some time before, and at his death, the testator kept a sum of Rs. 60,000 in deposit always ready to be applied, if necessary, in discharge of the Government revenue, and it has been argued that the clause of forfeiture could not operate harshly while that sum remained (as it has been proved in evidence still to remain) in deposit. It is not pretended that the testator in any way excepted this sum from the general trusts of his will; and the obvious answer to such argument of course is that the Rs. 60,000 now in deposit is capital, and could not be applied, under the powers or trusts of the will, to payment of the Government revenue. The person entitled to the Rs. 25,00 per mensem has no right whatever to resort to the Rs. 60,000, which might in fact, and in law, be withdrawn by the trustees at any moment and invested according to the express trusts of the will.

Again, it appears from the evidence that no less a sum than Rs. 20,000 has been expended since the death of the testator in absolutely necessary repairs of the *baithakhana*. We think it could not have been the intention of the testator to saddle

an annuitant of Rs. 30,000 per annum with so large an outlay. Moreover the only words in the clause under consideration which can be applied to the defendant are the words "devisee or tenant-for-life;" these words are quite different from the description which the testator elsewhere applies to a person in the defendant's present position, as for instance, where the jewels are excepted from the trust for sale, and where the Rs. 2,500 per mensem are directed to be paid; and we cannot think that the testator intended to include a person in the defendant's present position under the terms "devisee or tenant-for-life."

Upon the whole, therefore, we are of opinion that the time has not yet arrived when the testator intended the forfeiture clause to operate; and, upon this ground alone, we should dismiss the plaintiff's suit. But as it is intended to take the case before a higher tribunal, we think it right to express our opinion on the other questions which have been argued before us.

Assuming then, though contrary to our own clear opinion, that the time has arrived when the proviso for cesser would under ordinary circumstances take effect, the question arises, Has anything occurred to delay its operation in this particular case?

We think that, for the whole period during which the present plaintiff was, in his original suit, strenuously insisting against the defendant that, in effect, he was not entitled to occupy the *baithakhana* house and premises—for that period the plaintiff is debarred from claiming that effect should be given to the clause of forfeiture for non-residence. As against a remainder man, the suit of the plaintiff to declare the will inoperative might perhaps be not a sufficient excuse for not fulfilling the conditions imposed by such will. But as from December 1868 until August 1872 (the date of Her Majesty's order), the plaintiff directly challenged the power of the testator to give, and the right of the defendant to occupy, the *baithakhana* house and premises, we are of opinion that he at least is not now entitled to turn round and to claim, during the period that he disputed the will, the benefit of the condition as to residence, or to exact the penalty for its breach, if any. And we think

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this period would extend to September last, when the order in Council first arrived in Calcutta. Even apart from any action by the plaintiff, which in our opinion disentitles him from claiming the relief he now seeks, there are circumstances arising out of the conduct of the trustees which, we think, are sufficient to excuse non-residence by the defendant, and which would suspend the operation of the forfeiture clause until October 1872.

It must be remembered that the defendant was originally one of the trustees. It must also be remembered that, during the testator's life, the whole of his zemindari business was transacted at the *baithakhana* house, where what he called his Calcutta establishment was lodged. We are inclined to think, as we shall state more at length subsequently, that the testator intended that the conduct of the zemindari business should be continued at the *baithakhana* after his decease. But, be this as it may, it was impossible to remove the establishment from the *baithakhana* until new premises were provided by the trustees for the purpose. During the testator's life, the establishment occupied the whole of the ground-floor and godowns, and the testator's manager, who was appointed a trustee by the will, occupied, for the purpose of conducting the estate business, one room in what in England would be called the first, but which in Calcutta and by the witnesses is called the second, floor. After the testator's death, the business of the estate continued to be carried on in the same manner at the *baithakhana* by the trustees, the defendant then being one of such trustees until November 1869; and until then the defendant attended there daily for the transaction of business. About that time a quarrel seems to have occurred between the defendant and the other trustees. The defendant wished his own brother-in-law to be appointed a trustee to supply a vacancy which had occurred. The other trustees seem at first to have entertained this proposition; but ultimately and rather suddenly, in November 1869, after the necessary deeds had been engrossed and were ready for execution, they refused to concur, on the ground, as they now state, that, in the event of any difference arising among the trustees as to the management of the trust business, the defendant, having under the will a casting vote, would be

able, with the assistance of his brother-in-law, to completely override their opinion. In consequence of this quarrel, the defendant ceased at the end of November 1869 to go to or transact business at the *baithakhana*: but the defendant, by a letter dated the 14th of April 1870, demanded from the other trustees that possession of the *baithakhana* house should be given to him as entitled thereto under the will. The trustees, by a letter of the 22nd of April, insisted on their right to occupy the ground-floor and the one room on the first floor for the conduct of the estate business. In consequence of the assertion of such right, the defendant on the 6th of May 1870 instituted a suit against the other trustees for possession of the *baithakhana* house. This suit was resisted by the other trustees, but by a decree of the 15th of July 1870, it was declared that the defendant was entitled to possession. On the 19th of July 1870, the defendant wrote to the other trustees offering to allow them to retain possession of the ground-floor for the purposes of the estate business, until he himself should require the use of that floor; but the other trustees insisting on an unqualified right to the ground-floor, and also to the room on the first floor, appealed against the decree of the 15th of July; and, on the 21st of November 1870, the Appeal Court directed the lower Court to try an issue "whether it was consistent with the will that the defendant should be allowed to enter into possession." That issue was decided in the affirmative by the lower Court on the 1st of March 1871; and the Appeal Court on the 17th July 1871 made a declaration that it was consistent with the terms of the will that the defendant should enter into possession; and it ordered the trustees to deliver to the defendant possession of the *baithakhana*, except the ground-floor.

Throughout the whole of these proceedings, the trustees acutely contested the defendant's demand for possession so far as related to the ground-floor and the room on the first floor.

The plaintiff refers to these decrees as precedents to show that this Court has already construed the will, and has decided that the right—and therefore, as the plaintiff argues, the duty—of the defendant to reside commenced at the testator's decease. But we think that, even as between the defendant and the

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trustees, these decrees can be put no higher than as declaring that there was nothing inconsistent in the will with the defendant's qualified occupation. The form of the issue sent down for trial by the Court of Appeal shows that neither right nor duty was then in the contemplation of the Court. And the decree as to repairs, to be next mentioned, shows that the possession intended to be given was not a possession by right as tenant-for-life within the meaning of the forfeiture clause.

Upon obtaining this decree for possession, it appeared, as the evidence clearly shows to have been the case, that the *baithakhana* house was in an exceedingly bad state of repair; and, on the 26th of October 1870, the defendant made an application in writing through his solicitors to the trustees asking them to cause proper repairs to be effected. After some correspondence the trustees eventually refused to sanction the repairs unless under the direction of the Court; and, on the 22nd of December 1871, the defendant instituted another suit against the trustees, praying that it might be declared that the trustees should effect reasonable and suitable repairs to the *baithakhana* house. That suit was resisted by the trustees, but, on the 28th of March 1872, a decree was made directing them to make the repairs. Subsequently, Rs. 14,000 were expended in repairs, which were not completed until October 1872.

We are of opinion that, under the circumstances above related as having occurred between the defendant and the trustees, the forfeiture clause would not come into operation before October 1872, the defendant having, by no default of his own, been prevented until then from obtaining such a possession as is contemplated by the clause in question.

But it has been argued on behalf of the plaintiff that the question we have to decide has in fact been already decided by the order of Her Majesty in Council declaring the defendant to be entitled to a life-interest subject "to the provisions in the will not thereby declared to be void," and declaring "that, upon the failure or determination of the life-estate" of the defendant, the plaintiff is entitled as heir-at-law. The plaintiff's Counsel attempt to read these declarations with those passages of the judgment of the Judicial Committee which state that "the life-

interest was to begin at once," and that the construction proposed before the Judicial Committee "would defeat the limitations in case of non-residence;" and they argue that "as the life-interest was to begin at once, and was to be subject to the provisions of the will not declared to be void, and that as the plaintiff was declared entitled not upon the death of the defendant, but upon failure or determination of the life-interest," and as the forfeiture clause was not declared void, therefore under Her Majesty's order the plaintiff is now entitled to possession. But the language both of the judgment and of the order in the case before the Judicial Committee must of course be construed with relation to the questions brought for decision before that tribunal; and we have no hesitation whatever in saying that the present question never occurred to the Judicial Committee, and was certainly not intended to be decided by them. The passage in their judgment as to defeating the limitations in case of non-residence was addressed solely to the question whether, if the subsequent limitations were to be considered inoperative, a construction of the will under which an absolute interest should be taken by the defendant would accord with or be opposed to the intention of the testator as appearing in the will.

Only two questions now remain on which we need express our opinion, namely, as to the nature or quality of the residence intended by the testator, and as to the compliance by the defendant with the condition.

It appears from the evidence that the testator possessed a family dwelling-house, as well as the *baithakhana*, the two houses being completely distinct, and indeed situated on different sides of the same street; that, some time before his wife's death, he ceased to sleep in the family dwelling-house, after having complained of defective ventilation in his sleeping-chamber there; that thenceforth he slept at the *baithakhana*; that, subsequently during his wife's life, he took his mid-day or principal meal in the family dwelling-house, and his evening meal in the *baithakhana*; that, after his wife's death, he took both meals in the *baithakhana*, but the mid-day meal was taken in native fashion, and was cooked at the family dwelling-house,

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and the evening meal was taken in European fashion, and was cooked at the *baithakhana*; that he gave his native or strictly Hindu entertainments in his family dwelling-house, and his European entertainments at the *baithakhana*; that the testator's family idols were always lodged and worshipped at his family dwelling-house, and never at the *baithakhana*; and that at the *baithakhana* all the affairs of his estate were conducted, and the necessary establishment kept up and lodged.

We think it is to be gathered from the will that the testator never intended the *baithakhana* to be occupied as a dwelling-house in the ordinary sense of a Hindu family dwelling-house, because the line of succession to individual males which he desired and endeavoured to establish is altogether repugnant to such an idea. And we find upon the evidence that the *baithakhana* was not, and is not, adapted to the requirements of a family dwelling-house, and could not be adapted thereto except at a very considerable expenditure, of probably from Rs. 20,000 to Rs. 30,000. Moreover, the testator must have known, what are the facts, that the defendant was living joint in estate, food, and worship with his brother in a family dwelling-house in Calcutta suitable to his position; and that he had a wife and a number of relatives, many of them females, living in his house as members of his family.

Under these circumstances, and having regard to the meaning of the word *baithakhana* both by custom and by derivation, and also having regard to the European fashion in which the testator had furnished the house, we are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and, if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality; and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house.

And lastly we are of opinion, upon the evidence, that, since the completion of the repairs in October 1872, the defendant has so occupied the house as to comply with the testator's expressed desire that he should "use as his residence in Calcutta

the said *baithakhana* house, and make use of and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c.”

The question has been raised whether the will should not now be construed as giving a life-estate to the defendant freed from the forfeiture clause, inasmuch as the trusts in the will are executory, and as the testator expressed his intention that his son should take no advantage under his will, and further directed a conveyance to be made only “so far as the then condition of circumstances will admit;” and it has been pointed out that the only objects intended by the testator to take advantage of the forfeiture clause have been held to be incapable of taking; and that the testator’s desire for continuing residence at the *baithakhana*, which desire was the sole motive of the clause, cannot be enforced as against the plaintiff. But with respect to this question we do not feel called upon to give any opinion now, leaving it, if necessary, to be determined by a higher tribunal.

A great deal has been attempted to be made by the plaintiff’s Counsel with respect to the sale of certain jewels and religious articles which, at the testator’s decease, were in the *baithakhana*, and some of which are stated to have been purchased by, or on behalf of, the defendant’s undivided brother. We think it clear that the will directed that all these articles should be sold except such as the defendant should wish to retain for his own use. If any case of improper purchase by the defendant’s brother, on behalf of the defendant, can be made out, then it may be competent to the plaintiff to follow any jewels colorably sold, in a suit properly constituted for that purpose. The question of a colorable sale is quite foreign to the issue before us, and we give no opinion on the matter; but we must express our regret that so much of the public time should have been occupied by overlaying the plaintiff’s case with these and similar unimportant details, such as the sale of the aged horses and worn-out carriages, and the removal from the *baithakhana* of a cat and a canary.

All that we have now to do is to declare our opinion that the plaintiff has failed in every part of his contention; and we

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therefore direct that his suit be dismissed, as against all the defendants with costs on scale No. 2. The trustee-defendants will have such of their costs, as between attorney and client, as are not provided for by scale No. 2, out of the capital of the testator's estate.

Suit dismissed.

Attorneys for the plaintiff: Messrs. *Chauntrell, Knowles, and Roberts.*

Attorneys for the defendant, Rajah Juttendro Mohun Tagore: Messrs. *Swinhoe, Law and Co.*

Attorney for the trustees: Mr. *Hatch.*

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

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HALL v. JOAKIM AND ANOTHER.

Reference by Small Cause Court—Act XXVI of 1864, s. 7—Application to Small Cause Court for new Trial—Judgment contingent on Opinion of High Court.

The decision of a Small Cause Court rejecting an application for a new trial, but making such rejection contingent upon the opinion of the High Court, is not such a judgment as can be referred under s. 7, Act XXVI of 1864.

REFERENCE by the First Judge of the Calcutta Small Cause Court under s. 7, Act XXVI of 1864.

Judgment having been given for the defendants in a suit in the Calcutta Small Cause Court, the plaintiff applied for a rule calling on the defendants to show cause why a new trial should not be granted. The application was rejected; but at the plaintiff's request, the rejection was made subject to the opinion of the High Court upon two points then referred.

Mr. *Branson* for the plaintiff.

Mr. *Evans* for the defendants.

Mr. *Branson* was stopped by the Court in the course of opening the case, and the following judgment was delivered by

COUCH, C.J.—If the case is one upon which the Judges of the Small Cause Court think fit to take the opinion of this Court,

they have the power to grant a new trial upon such terms as they think fit: but it must be understood that we make no recommendation to do so. They must use their own discretion.

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We can only say that the decision of the Small Cause Court upon the application for a new trial is not a contingent judgment upon which any reference can be made to this Court under s. 7 of Act XXVI of 1864.

Mr. Evans's clients will have their costs of appearance in this Court,

Attorneys for the plaintiff: Messrs. *Robertson, Orr, Harriis,* and *Francis*.

Attorney for the defendants: Mr. *Carapist*.

Before Mr. Justice Macpherson.

RAMCHUNDER AND OTHERS v. CHOONEELALL AND ANOTHER.

Plaint—Signature and Verification by one partner of a Firm—Act VIII of 1859, s. 27—Act XIV of 1870 (Repealing Act, 1870)—Practice.

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By the practice of the Court, in a suit brought by a firm, one partner can, without having obtained special leave, verify the plaint on his own behalf and also on behalf of his co-partners.

Quære.—Whether such a practice is correct, or ought to be allowed to continue?

Act XIV of 1870 does not affect the procedure of the High Court.

IN this suit the plaintiffs were described as “Ramchunder of Burra Bazar, in the town of Calcutta, Daidraj at present of Benares, and Bhugwan Dass of Sahibgunge, all respectively carrying on business in co-partnership at Burra Bazar, in Calcutta, under the style and firm of Daidraj Bhugwan Doss.”

The plaint was signed and verified by Ramchunder for himself “and brothers.” No leave of the Court had been obtained by Ramchunder to sign and verify the plaint on behalf of the other plaintiffs.

Mr. *Phillips*, for Joynarain, one of the defendants, moved, on notice, to have the plaint taken off the file. He submitted that, under s. 27 of Act VIII of 1859, all the plaintiffs must sign and verify the plaint, unless special leave of the Court to

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do otherwise be obtained. It is a question whether, since the repeal by Act XIV of 1870 of the words in s. 382 of Act VIII of 1859, excepting Courts established by Royal Charter, from the operation of the Act, the provisions of s. 27 are not the substantive law of the Court, and not mere rules.

Mr. *Branson*, contra, relied on the case of *Lachlan v. Shaikh Abdulla* (1).

Cur. adv. vult.

MACPHERSON, J.—I find, that in the case of *Lachlan v. Shaikh Abdulla* (1), no special leave of the Court was obtained authorizing the partner, who verified the plaint in that case, to do so. Also, upon looking into the records of many other cases, I find that one partner has in fact frequently, without leave, verified a plaint on his own behalf and also on behalf of his co-partners, therefore, no doubt, Norman, J., had grounds for saying, in *Lachlan v. Shaikh Abdulla* (1), “that it has been the practice of this Court in a suit brought by a firm to allow a member of the firm to subscribe and verify the plaint.” I have great doubts whether that practice is right, or ought to be allowed to continue: but I cannot order this plaint to be taken off the file merely because it had, without special leave, been verified by one partner only. It does not appear, however, that the person who verifies the plaint, verifies it on behalf of himself and his co-partners; he verifies for himself and “brothers,” without saying that his partners and his brothers are the same persons. He must amend the verification by stating that he verifies on his own behalf as well as for his co-partners. Act XIV of 1870 does not affect the present question, nor the procedure of this Court, in any way. The preamble, as well as the body of that Act, show that the Act merely repeals what has become unnecessary, and does not affect or alter any existing practice or procedure. Each party will bear his own costs.

Application refused.

Attorney for the plaintiffs: Mr. *Pittar*.

Attorney for the defendants: Mr. *E. D. Moses*.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

H. MACKINTOSH v. J. GILL AND ANOTHER.

1873
August 14.

*Promissory Note payable by Instalments—Cause of Action—Act IX of 1850,
s. 34—Act VIII of 1859, s. 7.*

When two or more instalments of a promissory note, payable on the face of it by instalments, are due, the holder of the note is not at liberty to sue separately for each instalment, or for some of them; he must sue for all the instalments due in one action. A judgment recovered in a suit for one instalment when others are due is a bar to a suit subsequently brought for the latter (1).

CASE referred for the opinion of the High Court by the second Judge of the Calcutta Small Cause Court, under the following circumstances:—

On the 4th of September 1871, the defendants executed the following promissory note in the plaintiff's favor:—

“Rs. 400, *Calcutta, September 4, 1871.*

We jointly and severally, as principals, promise to pay to Mr. H. Mackintosh, or order, the sum of Rs. 400, in the following manner, for value received in cash in hand paid on signing and delivering this note, that is to say:—

On the 4th October	1871	... Rs. 50
„ „	4th November „	... „ 50
„ „	4th December „	... „ 50
„ „	4th January 1872	... „ 50
„ „	4th February „	... „ 50
„ „	4th March „	... „ 50
„ „	4th April „	... „ 50
„ „	4th May „	... „ 50
		Rs. 400

Should we neglect or fail to pay any of the instalments as it becomes due, then only shall such instalment as falls due and remains unpaid carry interest from its due date to the date of payment at the defaulting rate of ten per cent. per mensem.

Witness to Mr. Bridge's signature, (Sd.) John Gill.

(Sd.) JOHN GILL.

(Sd.) C. J. BRIDGE.

(1) See Act VIII of 1859, s. 2, and Act I of 1872, s. 40.

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The first three instalments having been previously recovered, partly by, and partly without, suit, the plaintiff, on the 24th of September 1872 (the five remaining instalments being at that time all due and unpaid), sued for the fourth instalment alone, and obtained judgment for the amount of it on the 4th October 1872. On the 11th of February 1873, he sued for the fifth instalment, when the defendants pleaded—

1st.—That all the instalments having fallen due prior to the institution of the suit, the only cause of action left to the plaintiff was for the whole sum then unpaid, namely, Rs. 250 on the five consolidated instalments, and that he was prohibited from splitting this cause of action, and bringing a suit for a single instalment, by the provisions of s. 34 of Act IX of 1850 (1).

2nd.—That the plaintiff having sued and recovered a judgment for the fourth instalment, when all the remaining instalments were already due, and he might have sued for the whole amount of the promissory note, was estopped by that judgment from suing for any other instalment.

For the plaintiff it was argued that each instalment constituted a separate and distinct cause of action, and consequently that he was at perfect liberty to sue for them separately.

The second Judge, before whom the suit came on for hearing, took time to consider his judgment. In the meanwhile the plaintiff, on the 21st of February last, brought another action for the sixth instalment, which, in the usual course of the distribution of cases, was heard by Mr. MacEwen, the third Judge of the Small Cause Court. The contentions in this case were similar to those urged in the action before the second Judge on the fifth instalment. Before the second Judge had pronounced judgment, Mr. MacEwen dismissed the plaintiff's suit, holding

(1) *Act IX of 1850, s. 34.*—"A plaintiff shall not be allowed to divide any cause of action for the sake of bringing two or more suits in any of the said" (i.e., Small Cause) Courts; but any plaintiff having a cause of action for more than Rs. 500 may abandon the excess, which shall be entered in the record, and stated in the summons, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding Rs. 500; and the judgment of the Court shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

that, under Act IX of 1850, s. 34, "a plaintiff at the time of bringing his suit must include all the damages which have then accrued to him in respect of the particular contract upon which he claims;" and that although "there was no doubt a separate cause of action as each instalment fell due, yet all having fallen in, the damages were complete, and the whole should have been included in the suit brought in October." In support of his opinion the learned Judge cited from Broom's County Court Practice, p. 56, the following passage regarding s. 63 of 9 & 10 Vict., c. 95 (the terms of which section are *verbatim* the same as those of s. 34 of Act IX of 1850)—
 "Suppose that, the facts (in *Grimbly v. Akroyd* (1)) being in other respects as there appeared, the total amount of the plaintiff's claims fell within the limit of the jurisdiction of the County Court, would he, if minded to divide or split it up into separate claims, and sue for it by separate complaints, be prohibited by the interference of a superior Court from so doing? Without venturing to answer this question, we may at all events reasonably conclude that the Judge of the County Court would, under such circumstances, interfere, and treat the judgment in the suit first brought as a bar to any other action."

Upon the dismissal of his suit by Mr. MacEwen, the plaintiff applied for and obtained a rule to show cause why there should not be a new trial. The rule was argued before the first Judge, Mr. Fagan, and Mr. MacEwen, who differed in opinion: and the rule was, therefore, made absolute subject to the opinion of the High Court on two questions then referred to it.

This reference came before Couch, C.J., and Pontifex, J., on the 17th June 1873, but they refused to give any opinion thereon, observing:—"It is a reference upon an application for a new trial, which this Court has lately held cannot be made" (2). They accordingly ordered the reference to be returned. Upon its return the second Judge, who had postponed giving judgment in the action on the fifth instalment, until the opinion of the High Court on the questions referred to it should have been pronounced, proceeded to dispose of the case before him. He agreed

(1) 1 Ex., 479.

(2) See *Hall v. Joaquim*, *ante*, p. 34.

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 GILL. in the views expressed by Mr. MacEwen; but as he considered that the point raised in the suit had never been expressly decided, he dismissed the plaintiff's suit contingent upon the opinion of the High Court on the following points:—

“1st.—Whether, when two or more instalments of a promissory note are due at the time of the institution of a suit, it is incumbent upon the plaintiff to unite them together, and sue in one action, or optional with him to sue separately on each separate instalment, or on some or all joined together?

“2nd.—Whether, if the High Court be of opinion that the plaintiff ought not to sue separately, and that all the unpaid instalments formed one cause of action, the judgment which the plaintiff recovered in October 1872, when the remaining instalments had also fallen due, can be treated as a bar to the present action?”

In his referring order he cited 1 Story on Contracts, pp. 29 and 30, and the American cases there mentioned.

Mr. *Gasper* for the plaintiff.

Messrs. *Bonnerjee* and *Marsden* for the defendant Bridge.

The defendant Gill did not appear.

Mr. *Gasper*.—There is nothing in s. 34, Act IX of 1850, to prevent separate suits being brought in respect of distinct instalments due upon one note. The section uses the words “cause of action,” and not the word “claim.” No doubt, when all the instalments were due, the plaintiff's claim was for Rs. 400, but each instalment, as it fell due, gave him a separate cause of action, and the fact that more than one instalment was due at any one time could not change the separate causes of action into one. [COUCH, C.J.—When, as in this case, there is a single contract and several breaches, all the breaches must be included in one action.] In *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1), it was held that arrears of rent for successive years are several and distinct causes of action in respect of which a plaintiff may institute separate suits. [COUCH, C.J.—It does not appear from the report of that

case whether the action was on a single covenant to pay rent. PHEAR, J.—We do not know the facts of that case. Here there was a single contract by which the defendant promises to pay Rs. 400 in a particular way.] If several instalments, when due, coalesce, so as to form only one cause of action, it is difficult to conceive how, while a suit might be maintainable on part of that cause of action, a suit for the remainder might be barred by the law of limitation. [COUCH, C.J.—That is an incident peculiar to the law of limitation.] In Byles on Bills, p. 417, note (k), the following distinction is taken :—“ If a note be payable by instalments on the face of it, an action of *assumpsit* lies for each instalment. If, however, the note is payable by instalments, but not on the face of it, only one action of *assumpsit* lies;” and *Siddall v. Rawcliffe* (1) is referred to, in which only one action was allowed, the note there being in the simple and ordinary form. In *Bolakee Lal v. Chowdhry Bungsee Singh* (2), a plaintiff, who had obtained a decree for an instalment due under an instalment bond, but had only realized a portion of his decree, sued for the unpaid portion of the instalment and for the whole of another instalment, and it was held that the suit was unaffected by s. 7, Act VIII of 1859.

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Counsel for the defendant Bridge were not called upon.

The opinion of the High Court was delivered by

COUCH, C.J.—We are of the same opinion as the Judge of the Small Cause Court in this matter. It is incumbent on the plaintiff, when two or more instalments of such a promissory note as this are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment, or for some of them.

We are also of opinion that the judgment which the plaintiff recovered on the 4th of October 1872, when the other instalments had also become due, is a bar to the present suit.

We must direct the judgment to be entered for the defendants

(1) 1 C. & M., 487.

(2) 7 W. R., 309.

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with the costs of reserving the question, and stating it for the opinion of this Court, and otherwise arising thereout or connected therewith.

Attorney for the plaintiff: Mr. Fink.

Attorney for the defendant Bridge: Baboo G. C. Chunder.

Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Phear.

GREENWOOD v. HOLQUETTE.

1873
Sept. 18.

Contract Act (IX of 1872), s. 108, excep. 1—Possession of Goods by Person other than Owner—Title conveyed by Vendor to Vendee.

The plaintiff let to *D* a piano on hire on the following terms:—"At Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer." These terms were embodied in a voucher which was signed by *D*. The monthly hire was not regularly paid, and the plaintiff sued for and obtained a decree for a portion of the hire up to May 1873. Subsequently, in that month, *D* sold the piano to the defendant, who obtained delivery of it in June. In a suit by the plaintiff in trover for conversion of the piano, the Judge found that the defendant acted in good faith.

Held, that the possession acquired by *D* was not possession by consent of the owner within the meaning of s. 108 of Act IX of 1872, excep. 1 (1), and that he did not by sale to the defendant transfer the ownership in the piano to him. Excep. 1 of s. 108 does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose.

(1) *Act IX of 1872, s. 108.*—"No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases:—

Excep. 1.—When any person is, by consent of the owner, in possession of any goods, or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the

goods of which he is so in possession or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods."

CASE referred for the opinion of the High Court by Mr. Sconce, 4th Judge (offg.) of the Calcutta Small Cause Court, under s. 55 of Act IX of 1850.

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“The plaintiff sued in trover for Rs. 350 for the conversion by the defendant of a piano. The plaintiff had let a piano worth Rs. 460 on hire to Mr. M. M. Datta upon terms which appeared in the following voucher given by Mr. Datta himself to Mr. Smith, the proprietor of the firm of Greenwood & Co.:—

Calcutta, 1st February 1872.

Received from Greenwood & Co. a new Daring's Square, No. 2318, on hire at Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer.

The monthly hire was not regularly paid, and on the 28th of May the plaintiff recovered a judgment before the 2nd Judge of this Court against Mr. Datta for Rs. 150, being arrears of hire due up to the 2nd May last at Rs. 30 per month for five months.

Previous to the institution of that suit, he had received the following letter from Mr. Datta:—

2, Baneapooker, 15th May 1873.

GENTLEMEN,—I regret to say that having been long confined to my bed, I am not in a position to meet your demand to-day. I am, however, ready to return the piano, and to make arrangement to pay you the sum I owe.

In July last, Mr. Smith ascertained that the piano was in the possession of the defendant, and on demanding its return was met by a refusal. He then instituted this action.

Shortly before the end of May, the defendant bought the piano from Mr. and Mrs. Datta, and got delivery on the 2nd June, and I found that the buyer acted in good faith and under circumstances ‘which were not such as to raise a reasonable presumption in his mind that the person then in the possession of the piano had no right to sell.’

Mr. Datta was not in possession of any document showing title; and the contract between the plaintiff and Mr. Datta contemplated a sale of the piano at the end of three years; but I was of opinion that Mr. Datta was, at the time of the sale to the

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defendant, in the position merely of a bailee for hire, and that unless the defendant had acquired a good title by the operation of the Indian Contract Act, s. 108, excep. 1 (1), the plaintiff would be entitled to judgment—*Loeschman v. Machin* (2) and *Cooper v. Willomatt* (3).”

The Judge held that s. 108, excep. 1 of the Indian Contract Act, was not intended to be applicable to the case; that the possession of the piano by the bailee, Mr. Datta, was not a possession by consent of the owner within the meaning of excep. 1; and that, therefore, he did not, by selling to a buyer acting in good faith, and under circumstances which were not such as to raise a presumption that the person in possession of the piano had no right to sell it, transfer the ownership in it to the buyer.

The Judge, however, entertaining some doubt as to the correctness of his opinion, reserved judgment, contingent on the opinion of the High Court, on the following questions:—

1st.—Was the possession of Mr. Datta a possession by consent of the owner within the meaning of the excep. 1, s. 108 of the Indian Contract Act?

2nd.—Did he, by sale to a *bond fide* purchaser under the facts found, transfer the ownership in the goods to the buyer?

No Counsel appeared for either party in the High Court.

After taking time to consider, the opinion of the Court was delivered by

COUCH, C.J.—The plaintiff in this case let to Mr. Datta a piano, which was said to be worth Rs. 460, on hire upon terms that are stated in a paper signed by Mr. Datta, and which is as follows:—(His Lordship read the voucher of 1st February 1872, *ante*, p. 43).

It is stated in the case before us by the Judge of the Small Cause Court that the monthly hire was not regularly paid, and, on the 28th of May, the plaintiff recovered a judgment before the 2nd Judge of the Small Cause Court against Mr. Datta for Rs. 150, being all arrears of hire due up to the 2nd May last, at

(1) *Ante*, p., 42.

(2) 2 Stark. B., 311.

(3) 1 C. B., 672.

Rs. 30 per month for five months; and that, on the 15th of May 1873, Mr. Datta wrote a letter to the plaintiff in which he said that he was not in a position to meet the demand on that day, and that he was ready to return the piano, and to make arrangements to pay the sum he owed. Shortly before the end of May, the defendant, Mr. Holquette, bought the piano from, as is stated in the case, Mr. and Mrs. Datta, and got delivery of it on the 2nd June; and Mr. Smith, who constitutes the firm of Greenwood & Co., having, in July last, ascertained that the piano was in the possession of the defendant, demanded its return, and having been met by a refusal, instituted this suit to recover Rs. 350 as damages.

The Judge of the Small Cause Court was of opinion that the plaintiff was entitled to recover. He found "that the buyer acted in good faith, and under circumstances which were not such as to raise a reasonable presumption in his mind that the person then in the possession of the piano had no right to sell;" but he still held that Mr. Datta, the seller, could not give to the defendant a better title to the piano than he had himself. Although he was of that opinion, he felt that there was some doubt raised by s. 108 of the Act which has been lately passed for defining and amending the law relating to contracts, called the Indian Contract Act, 1872, and he has reserved the question as to the construction of that section for the opinion of this Court. The section provides (His Lordship read the section and continued):—

I have already noticed that the Judge of the Small Cause Court has found that the buyer in this case did act in good faith, and therefore we have to consider what is the meaning of this exception. It is a question of some importance, and it would have been better that it should have been argued by Counsel, because a decision upon this Contract Act may have frequent application; but in the way in which it comes before us, being reserved by the Judge of the Small Cause Court himself, on a doubt which he entertained, and not at the request of either of the parties, in exercise of the right which is given by Act XXVI of 1864, where it is in the nature of an appeal from the judgment of the Small Cause Court, we must give our opinion after

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the best consideration which Mr. Justice Phear and I have been able to give to it. The opinion which I am about to give is our joint one.

In considering what is the meaning of the exception, we must look at the words of it. The cases of *Cooper v. Willomatt* (1) and *Loeschman v. Machin* (2), which the Judge of the Small Cause Court has referred to, cannot, we are of opinion, be used to guide this Court to a decision upon it. In construing this Act, which is to be the law of contract for India, we must not adopt as a rule of construction, that it was intended to make the contract law of India the same as the law of England. Indeed, there are reasons for thinking that the Legislature intended that in some respects there should be a different law for India; and therefore we cannot refer to any English case as a guide. We must look at the words of the law, and taking the whole of the exception, gather from them, as well as we can, what was the intention of the legislative authority. The words are:—"When any person is, by the consent of the owner, in possession of any goods, he may transfer the ownership of the goods of which he is so in possession to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary." Now, the last words appear to show that the possession which is meant by the first part of the exception is a possession which is unqualified, and not to be restricted otherwise than by the owner giving instructions to the person who has it. It is the kind of possession which a factor or an agent has, where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. He may give instructions to sell for not less than a particular price, or not before a particular time. It is such possession as an owner has, and, in such a case, it seems to have been intended that the person selling contrary to his instructions should give a title to the buyer, if the buyer acted in good faith. We think the exception does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose. In such a case

(1) 1 C. B., 672.

(2) 2 Stark. R., 311.

the owner has no right to give instructions. The nature of the possession, and the powers of the person having it, are determined by the contract of hiring, or the contract under which possession was taken, and is of a different nature from the unqualified possession which I have mentioned, where the owner has power to give instructions. The hirer has only a qualified possession. He acquires a right of possession only for the particular period or purpose stipulated. By the Roman law, the hirer acquired no property in the thing hired. By the English law, he has only a special property during the continuance of the contract, or for the purposes expressed or implied by it. By the sale of the thing his right of possession and his special property are both determined. Thus his possession is of quite a different character from the possession which, we think, was intended by this section, taking it as a whole. We are therefore of opinion that the plaintiff is entitled to recover the damages claimed in the suit, and that judgment should be entered for the plaintiff, with costs of suit, and the costs of stating and reserving the case for the opinion of this Court, and arising thereout.

The Judge of the Small Cause Court has made a slight error in the mode of referring this question, because, instead of giving judgment for the plaintiff and making it contingent upon the opinion of this Court, he appears to have reserved his judgment until he received the opinion. This is not quite correct; but we did not consider it worth while to send the case back for him to correct, it being a mere error in form. We therefore treat the case as if he had given judgment in the proper way for the plaintiff, contingent on the opinion of this Court, and decide that the plaintiff is entitled to judgment with costs.

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APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.

1873
July 29.

GUNGA NARAIN GHOSE AND OTHERS (PLAINTIFFS) v. RAM
CHAND GHOSE AND OTHERS (DEFENDANTS).*

*Appeal—Award of Arbitrator—Judgment according to Award—Act VIII
of 1859, ss. 324 & 325.*

A suit in the Munsif's Court was, after issues had been settled and evidence on such issues adduced by both parties, referred by consent of parties to arbitration. The arbitrator made his award, and on the next day an order was recorded by the Munsif that the parties were to file their objections to the award in one day, notwithstanding that s. 324, Act VIII of 1859, allows the parties ten days for such purpose. The plaintiffs, in accordance with that order, filed a petition of objection to the award, and an order was endorsed by the Munsif on this petition, that it should be laid before the Court with the papers of the arbitrator. The Munsif then gave his judgment in which he went into the evidence, and overruling the objection of the plaintiffs, gave a decision on the merits, which decision was in accordance with the award:

Held, that such judgment, though in accordance with the award, was not final under s. 325 of Act VIII of 1859, but was open to appeal.

In order to make it final, it should appear that all the proceedings have been regular, and the directions of Act VIII of 1859 complied with.

THE plaintiffs in this case sued to recover possession of a certain tank and ghaut, and to establish their right to take water from the tank by means of a water-course, which they said had been in use prior to their being dispossessed by the defendants. The defendants, among other objections, denied the plaintiffs' right to the tank, which they said had been dug on their own share of the land, with which the plaintiffs had no concern.

The Munsif, before whom the case was heard, framed several issues, among which were the following:—Whether the suit was barred by limitation? Whether the tank in suit was an old one,

* Special Appeal, No. 1718 of 1872, from a decree of the Judge of West Burdwan, dated the 10th July 1872, affirming a decree of the Munsif of that district, dated the 30th September 1871.

or had been newly excavated? Whether the plaintiffs were entitled to a one-sixth share in the tank, and had been dispossessed by the defendants? Whether the ghaut and water course were in existence, and had been closed by the defendants? Evidence was adduced by both parties upon all the issues in the case.

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The case was then referred to arbitration by agreement between the parties; and the arbitrator, on the 24th September 1872, brought in an award against the plaintiffs. On the following day an order was recorded by the Munsif that the parties were to file their objections to the award in one day. On the 26th September the plaintiffs filed their petition of objection, in which they complained that the arbitrator had decided the case in their absence, and without giving them any notice; that he was the pleader of the defendants; that he did not go through the record, and did not decide the case himself, but left it to one of the defendants, who was staying with him in his house, to do so; and that his award was unjust, and opposed to the admitted facts of the case. On the same day (the 26th September), an order was endorsed on the back of this petition by the Munsif to the effect that, as there was no charge of corruption or partiality, the petition was to be laid before the Court with the papers of the arbitrator.

On the 30th September the Munsif gave his judgment. On the question of limitation he said:—"The defendants contend that the suit to re-open the ghaut and the water-course, not being brought within two years, is barred by limitation under the provisions of s. 27, Act IX of 1871. This point will be tried with the merits of the case, for a question of right to the tank is involved; and if plaintiffs' right be proved, then there will be no bar to their use of the ghaut and of the tank." Then the Munsif, in a lengthy judgment, commented on the evidence, and recorded his reasons for preferring the evidence of the defendants' witnesses to that of the plaintiffs, and observed that the plaintiffs had no right to the tank, but had brought the suit with some improper motive. He then added:—"Both parties having, of their own accord, filed an agreement to have the matter referred for arbitration to Baboo Sreenath Das, a pleader of this Court, this

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record was, accordingly, sent to the arbitrator, who, for the reasons stated by him, submitted an award against the plaintiffs, and in favor of the defendants, stating that the former had no right to the disputed tank. The plaintiffs presented a petition of objection to the award; but such objection is not reasonable. They cannot charge the arbitrator with corruption or partiality, and the award does not appear to be in any way defective. Although it is urged that the award was not submitted within the time fixed, and the arbitrator is the vakeel of the defendants, yet this is no reason to set aside the award; for, though the time fixed in the first order of reference had expired, the award was submitted within the further time allowed, so it cannot be void; and the plaintiffs named the vakeel as an abitrator, well knowing that he had been engaged by the defendants, and they should have considered the matter beforehand, and ought not to raise the objection now. However, the pleader is a conscientious and respectable man, and not likely to give a false award merely because he was a pleader for the defendants. Had his award been influenced by his partiality to his clients, the suit No. 445, which was also between these parties, and referred to the same arbitrator by the agreement on both sides, would never have been decided by him in favor of the plaintiffs, and against the defendants. But the fact of his having done so naturally shows the impartiality of his present award. . . . For the above reasons I dismiss the suit, and direct that plaintiffs pay the defendants' costs."

On appeal, the Judge said:—"The Munsif's judgment is according to the arbitration award, and is final. The Munsif's proceeding contains much surplusage, but that does not prevent it from being a judgment according to the award. Therefore this appeal will not lie." Accordingly he dismissed the appeal.

From this judgment the plaintiffs preferred a special appeal.

Mr. G. Gregory (with him Baboo Bhawanichurn Dutt) for the appellants.

Baboos Romesh Chunder Mitter and Rashbehari Ghose for the respondents.

Mr. G. Gregory.—A judgment cannot be considered a judgment according to an award, within the meaning of s. 325 of Act VIII of 1859, so as to be final, unless the requirements of the law are fulfilled. By s. 324 an award is liable to be set aside for corruption or misconduct. The petition of the plaintiffs of the 26th September clearly charged the arbitrator with misconduct, yet no enquiry took place regarding the matters alleged therein. And by the same section parties are entitled to have ten days to apply to have the award set aside; here the Munsif gave them only one day, and he gave his judgment in the case before ten days had elapsed from the filing of the award. Besides, on reading the Munsif's judgment, it is clear he decided the whole case himself, and recorded his reasons in support of his decision upon every issue, and he expressly professes to decide the case on its merits. Having regard to all these circumstances, the way in which the Munsif's decision is worded, and the departure from the prescribed forms of the law regarding awards, it cannot be said that his reasons are mere surplusage, and that his decision is according to the award, and therefore final. It is his own judgment in the case, and an appeal will lie from such judgment.

Baboo Romesh Chunder Mitter for the respondents.—It is not imperative on the Munsif to give ten days for filing objections to an award. Even if it were, that time apparently was not wanted here, because the next day the plaintiffs filed their objections. [COUCH, C.J.—That was done under compulsion of the Munsif's order giving only one day.] Still the judgment is according to the award, and no appeal lies—*Sreenath Ghose v. Raj Chunder Paul* (1). The Court did not see cause to set aside the award, and refused the application of the plaintiffs. [COUCH, C.J.—The Munsif would not entertain this application because he says the plaintiffs did not charge the arbitrator with corruption or “partiality,” whereas the words of s. 324 are “corruption or misconduct.”] No doubt, the Munsif is wrong there, but so long as his judgment is according to the award, it is final—*Ramonoogra Chobey v. Mussamat Putmoorta Chobayan* (2).

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The judgment of the Court was delivered by

COUCH, C.J.—The reason for the Judge's dismissing the appeal is given in a few words. He says that the "Munsif's proceeding contains much surplusage, but that does not prevent it from being a judgment according to the award." But the whole question is whether that part of the Munsif's judgment in which he refers to the evidence in the case, and professes to be founding his decision upon it, and not upon the award, can be considered as surplusage,—whether the fair construction of his judgment is not, that he considered the case as it was proved, and having done that, brought in the award, not as the sole foundation of his judgment, but as confirming the view which he had taken in the previous part of it. Even if all the proceedings in the arbitration had been regular, this would probably be the most natural construction to put upon the judgment; for if the Munsif was doing only what the Act requires, giving a judgment according to an award, which he had decided ought not to be set aside, all he had to do was to state that he gave his judgment according to the award, and to make the decree in conformity with it. I do not think we ought to suppose that he introduced into his judgment all the other matter without some reason.

But when we look at the proceedings, there is good reason for holding that this judgment was not merely a judgment upon the award. By s. 324 of the Civil Procedure Code, the plaintiff had ten days to apply to set aside the award. The Munsif, disregarding that, made an order that the objections to the award should be filed within one day. It was not to be expected that the plaintiff would disregard that order, irregular and improper as it was, and his filing his objections cannot be considered a waiver of the irregularity. He never consented to take less than the time which the law allowed him; he did not voluntarily file his objections in one day, but upon the compulsion of the order of the Munsif. And although he had given in his objections, the Munsif ought I think to have waited until the expiration of the ten days before he gave a judgment, if he intended to give it as upon the award. The law allows ten

days, and it appears to me that the decision which is referred to in Mr. Broughton's edition of the Procedure Code (1) is a right one.

I think we must consider the irregularity of the proceeding when we are determining the nature of the judgment. It appears to me that the Munsif did not determine to proceed strictly under the Act as upon the award, and that he thought, as I have observed on other occasions Munsifs have done, that the fairest and best mode of treating the matter was to see whether, in his judgment, the award was a right one. Accordingly, he gave what he considered a right decision upon the merits, which was also in accordance with the award. We must not consider that as a judgment under s. 325 which is declared to be final, but a judgment which is open to appeal. In order to make it final under s. 325, I think it should appear that all the proceedings have been regular, and the directions of the Act have been complied with, which they were not in this case.

I therefore think that the decision of the Judge was wrong. His decree must be reversed, and the case must be remanded to him for re-trial. The costs will follow the result.

Appeal allowed.

PRIVY COUNCIL.

NUFFERCHUNDER PAUL CHOWDRY AND ANOTHER (HEIRS OF PLAINTIFF) v. JONATHAN POULSON (DEFENDANT).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

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Res-judicata—Enhancement of Rent—Declaratory Decree.

Where, in a suit for enhancement of rent, the plaintiff failed to prove notice of enhancement, but the Court enquired into, and gave a declaratory decree as to, his right to enhance, such decree is decisive of the right in a

* *Present*:—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

(1) *Sunt Lall v. Baboojee*, S. D. A. (N. W. P.) for 1863, 42.

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subsequent suit for enhancement of the rent of the same tenure founded on a valid notice.

The decision in *Rakhal Doss Bose v. Sheikh Golam Surwar* (1) approved of.

THIS was an appeal from a decision of the High Court (Phear and Hobhouse, JJ.) of the 1st August 1868, reversing a decision of the Assistant Collector of Nuddea as to right to enhance rent.

The following were the facts of the case:—In 1260 (1853) the male appellant's father, Muddoosoodun Paul Chowdry, became zemindar of a portion, and patnidar of the remainder, of Taruf Dogachia, *alias* Juggobundunpore. A general measurement of the talook having been made in 1262 (1855), Henry Poulson, the father of the respondent, was ascertained to have possession of 3,334 bigas of land in Mauza Dogachia. Muddoosoodun's father, having ascertained the current rates of rent in the district, assessed the rental payable by Mr. Poulson at Rs. 3,455-4-5; and, on the latter refusing to pay that rent, he was, in Jaishita 1263 (May and June 1856), served with a notice under ss. 9 and 10 of Regulation V of 1812, which was then in force. Mr. Poulson having made default in payment of the rent so claimed, and having paid only Rs. 1,164 per annum, instead of Rs. 3,455-4-5, Muddoosoodun, on the 6th August 1858, brought a suit against him in the Court of the Principal Sudder Ameen of Nuddea for recovery of the arrears at the higher rate, and relied on the notice of increased rent.

The defences to the suit were, 1st,—a denial of the service of notice; 2nd, that defendant held *mokurari* pottas, granted to a Mr. Ingles and himself at a fixed rent, the former being alleged to be dated Sraban 1231 (1824), and the other in 1244 (1837), and that, with these pottas in existence, the rent could not be enhanced.

The Principal Sudder Ameen held that the notice was proved to have been served, and also held that the alleged pottas were fabricated; and he decided that the plaintiff's father was entitled to an increased rent at the rate of Rs. 1,247-10-7, instead of the old rent of Rs. 1,164.

Against that decision both parties appealed to the High Court, the defendant seeking to have his alleged *mokurari* pottas confirmed, and to have the finding as to the service of the notice annulled; the plaintiff seeking to obtain all the rent demanded.

On the 1st February 1863, the High Court (Raikes and Pundit, JJ.) held that service of the notice was not proved. Their Lordships, however, considered that, notwithstanding the failure to prove service of the notice, the plaintiff was entitled "to obtain an adjudication of the defence of the defendant, who denies the title of the plaintiff to reassess and enhance."

The judgment proceeded thus:—

"As, however, this Court is of opinion that, in a case in which notice has not been served, the landlord, under the law as it stood before Act X of 1859 was passed, could not obtain any enhanced rent without serving a notice, even after obtaining a decree fixing the enhanced rent; and as, under the new law, a new procedure altogether is to be adopted with regard to the service of a notice to reassess, the Court thinks that, while it is unavoidably necessary to pronounce in this case an opinion upon the appeal of the tenant regarding the genuineness of the pottas, pleaded by him in bar of the right of the plaintiff, it will not at all be expedient to proceed further to any adjudication upon the question of rate of rent, and quantity of lands. With reference to the pottas, the Court sees no reason to disturb the finding of the Principal Sudder Ameen, as the defendant has not been able to shake any one of the several arguments of the lower Court upon this point. He has not put in the receipts for rents paid to the former landlords by him and his predecessors; and the accounts put in by him as papers of account of rents, given to the tenant by a former farmer of the landlords and vendor of the plaintiff, go rather to disprove than to establish the case for the defence. No holder of a permanent hereditary and transferable lease will be satisfied without receipts for rents, stating the nature of his tenure, or even keep accounts with, or take accounts current from, any agent of his landlord. Even if anything so extraordinary be supposed to have been done, anyhow in this case it is not satisfactorily explained why no regular receipts for rent were demanded besides these accounts. On these grounds, it is ordered that the appeals of the plaintiff-appellant be dismissed, and the order of the lower Court, fixing the assessment and awarding the arrear at the rate fixed therein, be amended:

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"The pottas produced by the defendant are pronounced as not proved; the plaintiff is entitled to assess the lands held by the defendant on service of notice as now required by law; and both the parties are to bear their own costs of both the Courts."

The defendant in that suit having died, possession of the premises was taken by G. J. Thurlow, Henry Poulson's executor, and on the 22nd Chaitra 1272 (March 1866), Muddoosoodun duly served the following notice:—

"To the tenant G. J. Thurlow, executor on behalf of the late Henry Poulson's sons, Mr. John Poulson and Mr. Jonathan Poulson, of the Dogachia factory, of Thanna Kurreempore.

"In my zemindari and patni talook Taruf Juggobundunpore, *alias* Mauza Dogachia, appertaining to Peigunna Kismut Dogachia, you are holding possession of 3,320 bigas, 1 kata, 4 chittaks of land, of various descriptions, as found by the investigation of the Court Ameen. With the exception of the newly-formed alluvial chur, you are paying Rs. 1,163-18-15 as rent of the said lands, at an unfixed rate, which is less than the rate prevailing all around. Taking the full rate, and as the value of the crop, mulberry, silk and indigo, growing thereupon, has now increased, and the productive power of land has also increased of itself without your agency, and all kinds of fruit and trees; and on that account, the garden, lands, and habitation having increased, the value of homestead lands has also increased,—therefore an annual rental of Rs. 10,068-6-4 of the said lands having been fixed according to their various descriptions, and the undermentioned *jummabandi* notice is given to you, according to the provisions of s. 13 of Act X of 1859, that you do continue to pay the said rent to me, according to the instalments from the beginning of Baisakh 1273."

At the foot of the notice was a detail of the land and rent.

The increased rent not being paid, Muddoosoodun, on the 15th March 1867, filed his plaint, in the Court of the Assistant Collector of Maherpore, claiming rent, since the date of the notice, at the rate of Rs. 10,068-6-8. On the 17th May 1867, the respondent, who had bought from Thurlow, took defence to the action, by filing a written statement. He objected, first, that an action, founded on a notice to the executor, could not be maintained against the respondent. Secondly, that his predecessor had held the disputed jumma in *maurasi* from generation to generation, at a uniform rent, from before the

decennial settlement, and that the plaintiff was not, therefore, competent, under ss. 3, 4, and 16 of Act X of 1859, to enhance the rent. His third objection was to the rate at which the rent was assessed, on the ground that the land was over-valued.

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On the 22nd July 1867, Muddoosoodun having died, the suit was revived by the appellants. On the 26th July 1867, the Assistant Collector settled as issues—

1st.—Whether the notice was regular?

2nd.—Whether the holding of the respondent was liable to enhancement?

3rd.—Whether the rates of enhanced rent, claimed by the plaintiff, were excessive?

Several witnesses were examined as to the value of the land, in order to show that it had increased; the respondent's witnesses denying this. The respondent himself gave evidence in his own favor, and alleged that he held the land under what he alleged to be a *maurasi* lease, at a rental of Rs. 1,163-15 per annum, and he deposed to his title, as so holding, being derived through a Mr. Dunn, Messrs. Gisborne and others, from one Henry Van Ingles, who, the respondent deposed, got *maurasi* leases from the appellant's predecessors. He stated that he did not know in what year Van Ingles got the alleged *maurasi* leases; but he tendered in evidence three documents, dated 2nd Sraban 1231 (1824), purporting to be such leases, and one in his own favor dated 2nd Baisakh 1244 (1837), being the documents set forth as, but held not to be, genuine documents, in the abovementioned suit brought against his father by the appellants' father. In addition to these so-called leases, the respondent filed receipts for payment of rent for a number of years, and the various conveyances of the indigo factory, for the purposes of which these lands were held, from the previous owners of the factory, the first being dated in 1835. The appellants filed their title-deed as patnidars, the notice of enhancement, and the decision of the High Court above referred to. On the 30th November 1867, the Assistant Collector decreed the suit in favor of the appellants, but only for a rental

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increased to Rs. 1,595-10-10. In his judgment he held that the notice was sufficient. As to the question whether the land was liable to enhancement of rent, the Assistant Collector said:—

“With regard to the second issue, the defendant Jonathan Poulson contends that his tenure is not liable to enhancement, being of the nature observed in s. 16 of Act X of 1859. The evidence of Ram Bromo Lahoree and Goorodass Mozoomdar, and that of Mr. T. W. Dunn taken by commission, together with the receipts filed by the defendant, leave no doubt in the mind of the Court that the tenure has been held at a fixed rent, which has not been changed for the space of twenty years. Mr. Dunn, it will be remembered, was in possession of the tenure so far back as 1839. To render, then, the tenure liable to enhancement, it must be shown that the tenure has not been held at the same rent from the date of the permanent settlement, or that the rent was fixed at some period subsequent to the date of the permanent settlement. Advertence must here be made to case No. 180 of 1860, being an appeal to the High Court, in which the parties in this case were respectively appellant and respondent. The defendant has, in the present case, filed a number of pottas, which the High Court in the appeal pronounced disproved, affirming the views of the Principal Sudder Ameen in the original case with respect to them. The defendant has made no further attempt to prove the genuineness of these pottas, except so far as the receipts do so; and, with the High Court's decision in view, they cannot here be received as evidence. The receipts which are filed in this case do not seem, from the High Court Judges' remarks, to have been filed in the case they dealt with; and finding the pottas disproved, they decreed that the plaintiff was entitled to assess the lands held by the defendant. It is very clear that there has been produced in the case before me the evidence which was not forthcoming in the 1860 case, tried by the Nuddea Principal Sudder Ameen: but ~~it~~ having been distinctly decreed by the High Court that the plaintiff is entitled to assess the lands held by the defendant on the service of notice, as required by law, the benefit of s. 16 of Act X cannot be availed of by the defendant, for the question as to the plaintiff's right to enhance the rent of the tenure has been made a *res judicata* by the High Court's decision referred to.”

Cross-appeals were presented to the High Court, the appellants contending that the Assistant Collector had not valued the land at a sufficient rate; the respondent contending that the

decision in the former suit did not constitute a *res judicata*, and that the lands were not liable to enhancement of rent, and that the notice was informal and bad.

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On the 1st August 1868, the High Court (Phear and Hobhouse, JJ.) reversed the decision of the Assistant Collector, and dismissed the suit on the ground that Act X of 1859, s. 4, created a presumption that the rent had been paid at the same rate since the date of the permanent settlement.

The following was their judgment:—

“ We are very clearly of opinion that the rent at which the land now in suit has been held, has not been changed for a period of twenty years, immediately preceding the commencement of this suit; and we also consider it is not proved that the land has not been held, at that rent, from the time of the permanent settlement; nor is it proved that that rent was fixed at any period. It is possible that we might have had some hesitation on the latter point, had certain pottas, which have been referred to, been in evidence before us. But we find, whether rightly or wrongly, the lower Court refused to receive these pottas as evidence, and the plaintiffs’ pleader has strenuously urged before us that they are not to be treated as evidence, although they are in the record, and although he himself exhibited a disposition, which was not easy of expression, to use them as evidence, on behalf of his own client. This being so, we do not see how we can avoid giving the defendant the benefit of the statutable presumption which is provided by the terms of s. 4, Act X of 1859. We have been referred to a case of *Rakhal Doss Bose v. Sheikh Golam Surwar* (1), in which this Court appears to have held in a suit brought by a landlord against his tenants for arrears of rent at enhanced rates, under the provisions of Act X, that the appellant, notwithstanding he had established the twenty years of enhanced rent, was not entitled to the benefit of s. 4, Act X, solely in consequence of a decree which had previously passed between the parties; and it is now said that, on the same *ratio decidendi*, the decree passed by the High Court between the parties to the present suit in 1863 has the effect of depriving the defendant, now before us, of any benefit derivable from s. 4. It is enough for us to say that the report of the case of *Rakhal Doss Bose v. Sheikh Golam Surwar* (1) discloses some unusual connexion between the suit in which the first decree

(1) 2 W. R., Act X Bul., 69.

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was passed and the suit under Act X, which is the subject of the report; and we are unable, without better knowledge of the facts than the report conveys, to judge whether or not we should have come to the same conclusion as the learned Judges, under the peculiar circumstances of that case, did come to with regard to the claim of the defendant. But it seems to us obvious that what we have to consider is pure matter of fact, and not of law. We are bound, by the very words of s. 4, Act X, to look solely to what is proved in the case before us, and we cannot refrain from giving the defendant the benefit of the evidence which is in the record, merely because, in a suit five years ago, it was declared by a competent Court that the landlord at that time had a right to enhance his rent. Such a declaration, unaccompanied by any actual alteration of rent, is irrelevant to any of the questions raised by the provisions of s. 4. With these merits we think that the appeal must be decreed, the decision of the lower Court reversed, and the plaintiff's suit dismissed. The defendant must have his costs in both Courts.

The plaintiffs appealed to Her Majesty in Council.

Mr. J. D. Bell for the appellants.—The decree of the High Court of 1st February 1863 is binding, and the right to enhance is *res judicata*. The plaintiff in that suit was entitled to a declaratory decree—*Gumani Kazi v. Harihar Mookerjee* (1). The question was raised as a direct issue and adjudicated upon—*Meer Bahadoor Ali v. Mussamut Sunneechuroo* (2). There is here no presumption arising; the defence relies upon pottas showing that the tenancy was created long after the date of the permanent settlement, *Kunda Misser v. Ganesh Singh* (3), and though those are rejected as not genuine, the defendant is not entitled to say you must presume my tenancy began earlier. It comes within the exception at the end of Act X of 1859, s. 16, which is the section applicable, and not the 4th as erroneously printed in the High Court judgment. The plaintiff has given all necessary proof—*Rakhai Doss Bose v. Sheikh Golam Surwar* (4).

(1) B. L. R., Sup. Vol., 15;
 S. C., 1 Marsh., 523
 (2) 6 W. R., 157

(3) 6 B. L. R., App., 120.
 (4) 2 W. R., Act X Rul., 69.

Mr. *Doyne* for the respondent.—A potta does not necessarily show that the possession began on the date it bears; a potta may be demanded at any time. There is no estoppel pleaded here, and it is a mistake to say the defendant has pleaded the pottas as the origin of his title. The Court had on the former occasion no jurisdiction to entertain the question of enhancement. It is proved that the rent has not been changed for twenty years, and the plaintiff has given no proof to the contrary, so the presumption must arise under s. 16. It is only after service of notice that the right to dispute the power to enhance arises under Act X of 1859, s. 14.

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Mr. *J. D. Bell* in reply.

Their LORDSHIPS gave the following judgment:—

This was a suit for enhancement of rent, to which the defence in substance was that the land, with reference to which the question arose, had been held at a uniform rent from the decennial settlement, and the defendant sought to avail himself of ss. 15 and 16 of Act X of 1859. The Deputy Collector gave his decision for the plaintiff, and determined upon a certain enhanced rent in pursuance of inquiries which he had made. This decision was reversed by the High Court, who held that the plaintiff was not entitled to enhance.

The question has been reduced to one of comparatively small dimensions. The defendant, as has been stated, relies upon ss. 15 and 16 of Act X of 1859. Those sections are in these terms:—S. 15 says:—"No dependent talookdar, or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the ryots," which is this case, "who in the provinces of Bengal, Behar, Orissa, and Benares, holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 51, Regulation VIII of 1793, or in any other law to the contrary notwithstanding." Then s. 16 goes on to say:—"Whenever, in any suit under this Act, it shall be proved that the rent at which a talook

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or other tenure is held in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such talook or tenure has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

In their Lordships' opinion, the defendant did establish that the rent at which the talook was held had not been changed for a period of twenty years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing "the contrary" (in the words of the Act), or that the rent had been fixed at some later period; and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove. His proof consisted mainly in this:—That in 1860 a suit was brought, which was decided in 1863 by the High Court, by the plaintiff, or his predecessor in title, against the defendant's father, under whom the defendant claims, for enhancement of rent. The case of the defendant was then this:—In the first place he said that no sufficient notice had been proved; secondly, he said that the talook had been granted to him, or his predecessor in title, in the year 1824, by various pottas, and that they fixed a uniform *mokurari* rent which could not subsequently be changed. But he did not set up any title previous to those pottas. He did not set up that which was open to him to set up, namely, that he had held at a fixed rent from the permanent settlement, or, indeed, twelve years before it, which at that time would have been an answer to the case. It should be stated that this suit was decided before Act X, to which previous reference has been made, came into operation. The state of the law then was, that he could defend himself by showing an ancient tenure going back twelve years before the decennial settlement; but he made no case of the kind. He made a case of *mokurari* tenure, established by pottas in 1824. Upon that case the Court below gave a decree to the plaintiff on both points, on the ground that the notice was sufficient, the pottas not being established, and that the power to enhance had been proved. The High Court upon appeal disagreed with the lower Court upon the first point.

They held that the notice was not sufficient, but they proceeded to decide that the plaintiff had a right to enhance.

It has been said that this declaration on their part that the plaintiff had a right to enhance, although he had given no sufficient notice, was *ultra vires*; that upon failure of proof of notice, the Court had no right to make any such declaration, and, consequently, that such declaration is of no effect. But their Lordships upon this point entirely adopt the decision in the case of *Gumani Kazi v. Harihar Mookerjee* (1) heard before Sir Barnes Peacock, and Steer, Norman, Kemp, and Seton-Karr, J.J., which is precisely in point upon this question. It is there stated that "in a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved." In this case the question of the right to enhancement was tried, as well as the question of notice, and the Court gave a declaratory decree as to the right to enhance.

That being so, their Lordships are of opinion that this decree of the Court in 1863 does amount to proof sufficient to rebut the presumption referred to in s. 16 of Act X of 1859, arising from twenty years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement. It also amounts to proof that the rent was fixed at some later period.

On this ground, therefore, their Lordships are of opinion that the plaintiff has satisfied the burden of proof which was thrown upon him. This decision of their Lordships is ~~very much~~ in accordance with a case in the High Court, on the 15th February 1865, of *Rakhal Doss Bose v. Sheikh Golam Surwar* (2), which is thus described in the marginal note:—"The bringing of a suit by a landlord to recover arrears of rent at enhanced rates, under Act X of 1859, cannot annul the former decree of a competent Court, declaring the ryot's holding to be liable to enhancement,

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(1) 1 Marsh., 523; S. C., B. L. R., (2) 2 W. R., Act X Rul., 69.
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by entitling the ryot (on proof of payment of uniform rent for twenty years) to claim the benefit of the presumption under s. 4." It is to be observed that s. 16 is almost in the same words as s. 4, the one referring to ryots, and the other to under-tenants or talookdars.

With respect to the question of the pottas, which were put in evidence by the defendant in the former suit which has been referred to, but which were not believed to be genuine at that time, either by the Court of first instance, or the Court of Appeal, it appears that these pottas were rejected also in the present suit, both by the Court of first instance and the Court of Appeal. Their Lordships are not prepared to say that that rejection was wrong; but even if they had been received in evidence, their Lordships are of opinion, upon referring to them, that they would not have established the contention of the defendant in this suit, that he had held by a uniform tenure, commencing, at all events, as early as the decennial settlement. The effect of those grants does not appear to be to show a mere continuance of possession, but according to their Lordships' view, they rather point to the creation of a new title.

For these reasons, their Lordships are of opinion that the decision of the High Court should be reversed; that the appeal of the respondent from the Court of the Assistant Collector to the High Court should be dismissed with costs; and that the last-mentioned judgment of the Assistant Collector should be confirmed. Their Lordships will humbly advise Her Majesty to this effect. The respondents will pay the costs of this appeal.

Appeal allowed.

Agents for appellants: Messrs. *Watkins* and *Lattey*.

Agent for respondent: Mr. *Wilson*.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

AMEERUNNISSA KHATOON, WIDOW OF MOULVIE ABDOOL ALI (JUDGMENT-DEBTOR) v. MEER MOZUFFER HOSSEIN CHOWDHRY *alias* MEHER MEAH AND ANOTHER (DECREE-HOLDERS).*

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Act VIII of 1859, ss. 210, 211, 246—Execution of Decree—Claim by personal Representative of Judgment-debtor—Appeal—Act XXIII of 1861 s. 11.

Where it was sought to execute a decree obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the personal representative of the deceased judgment-debtor, and such personal representative claimed to hold the property not in her representative character, but in her own right: *Held*, that her claim was not a claim under s. 246, Act VIII of 1859, but that the case came under ss. 210 and 211. It was a matter between the parties to the suit relating to the execution of the decree, and as such was, under s. 11, Act XXIII of 1861, to be determined by the Court executing the decree, and not to form the subject of a regular suit. The order rejecting the claim was therefore open to appeal.

THE appellant in this case, Mussamut Ameerunnissa Khatoon, was the widow and one of the representatives of Moulvie Abdool Ali, deceased. The respondents, Meer Mahomed Mozuffer Hossein and others, had brought a suit and obtained a decree against Abdool Ali, against which decree an appeal was preferred to Her Majesty in Council, and Abdool Ali having in the meantime died, Ameerunnissa came on the record as a defendant; but the original decision was affirmed. The plaintiffs now sought to execute their decree by attaching the immoveable property in the possession of Ameerunnissa and others, and thereupon Ameerunnissa represented to the Court that she was in possession of such immoveable property, not as representative to the deceased Abdool Ali but in her own right. This objection or plea of Ameerunnissa appears to have been dealt with by the Court below, as, indeed, it seems to have been regarded by all parties, as a question arising under s. 246 of the

* Miscellaneous Regular Appeal, No. 89, preferred on the 26th March 1873, against the order of the Subordinate Judge of Zilla Backergunge, dated the 28th February 1873.

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Civil Procedure Code, and the Subordinate Judge in dealing with it observed:—"In summary cases it is unnecessary to observe anything as regards the invalidity of the documents filed by the objector. It is only necessary to determine possession by right of inheritance which, under the circumstances of this case and case No. 82 mentioned above, is proved, that is, the claimant objector holds possession over the said properties by right of inheritance from Moulvie Abdool Ali, deceased, judgment-debtor." Ameerunnissa now appealed to the High Court on the ground that her objection had not been tried out.

Baboos *Romesh Chunder Mitter* and *Nullit Chunder Sen* for the appellant.

Mr. *Woodroffe* (with him Baboos *Kali Mohun Doss*, *Doorga Mohun Doss*, and *Kashikant Sen*) for the respondents.

The arguments fully appear in the judgment of the Court which was delivered by

JACKSON, J. (after stating the facts as above, and observing, with reference to the Judge's mode of dealing with Ameerunnissa's plea, "that looks very much like trying one side of the case, and refusing to try the other," continued).—Mr. Woodroffe, who appears for the respondents, contends that this being a decision on a claim under s. 246, the order of the Court below is not subject to appeal, but the party aggrieved is at liberty to bring a suit to establish her right. Several cases have been cited to us in which, unquestionably, this view of the case has been taken, notably, *Maharaja Dheraj Mahatab Chund Bahadoor v. Mussamut Pearcee Dossee* (1), *Shurfun Bebee v. The Collector of Sarun* (2),

(1) 6 W. R., Mis., 61.

Act VIII of 1859, s. 246—Execution—Personal Representative.

(2) *Before Mr. Justice Phear and Justice Sir C. P. Hobhouse, Bart.*

The 24th July 1868.

Messrs. *R. E. Twidale* and *C. Gregory* for the appellant.

SHURFUN BEBEE (DEFENDANT)
v. THE COLLECTOR OF SARUN,
REPRESENTING THE COURT OF
WARDS (PLAINTIFF).*

Baboos *Kishen Kishore Ghose* and
Juggodanund Mookerjee for the
respondent.

* Special Appeal, No. 707, preferred on the 27th March 1868, against the decree of the Judge of Zilla Sarun, dated the 80th December 1867, affirming the decree of the Munsif of Chuprah, dated the 15th February 1869.

In re J. B. Rainey (1), Haris Chandra Gupta v. Srimati Shashi Mala Gupta (2), and Kali Charan Gir Gossain v. Bangshi Mohan

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THE judgment of the Court was delivered by

PHRAE, J.—The plaintiff in this suit, alleging that he is owner in possession of one-third of an 8 annas share of a specified mauza, and that his enjoyment thereof is menaced by reason of the defendant having attached it, caused it to be sold, and then himself purchased it, in execution of a decree held by him against a third person, prays for a declaration of his, the plaintiff's, right of ownership and possession.

The title which the plaintiff sets up is as follows:—The 8 annas share in question formerly belonged to one Shahamut Ali Khan, who, by two deeds made in the years 1810 and 1813 respectively, mortgaged it, under the form of a conditional sale, to Hirchal Oopadhia. Shahamut had three sons, Hossein Ali, Soojut Ali, and Nusseerut; and in 1819 he sold nearly all his property, including the premises mortgaged by the deeds of 1810 and 1813, to his two eldest sons, Hossein Ali and Soojut Ali. In the following year, 1820, these two sons, with the view to liquidating their father's debts, entered into a new arrangement with Oopadhia, and, amongst other things, got him to accept a fresh mortgage from them of the 8 annas share, in lieu of the original two mortgages of the same given in 1810 and 1813. Afterwards, namely, in 1830, Oopadhia took due steps for foreclosing the mortgage against Hossein and Soojut, and obtained his final decree for foreclosure in 1831. Subsequently to this again, it appearing that the mauza was being held free of payment of Government revenue, the Government revenue

in 1842, among other mehals, settled the 8 annas share with Oopadhia's widow as representing the proprietor, her late husband, then deceased. From Oopadhia's widows the plaintiff derived by purchase the one-third of the 8 annas share, in respect of which he sues.

The case put forward by the defendant is certainly very remarkable. With one exception he scarcely contravenes the plaintiff's facts. He says that he has become by purchase the holder of a decree which was obtained in 1836 against the heirs of Shahamut on a money debt of the latter, and that in execution of that decree he, in 1866, caused the rights and interest of Nusseerut (Shahamut's third son) in the mauza in question to be attached and sold, and at that sale he himself, the decree-holder, became the purchaser. Standing thus in the shoes of Nusseerut, he maintains that the plaintiff has not made out a right to possession of the share to which Nusseerut, as one of Shahamut's three sons, was entitled in the 8 annas mauza, subject to the first mortgage transaction of 1810 and 1813; because the sale of 1819 was, he avers, a fraudulent transaction between the father and the two elder brothers, and the foreclosure effected against Hossein and Soojut in 1831 could not affect Nusseerut's interests.

It appears, further, as part of the facts of this case, that, when the property in suit was attached in 1866 at the defendant's instance, in execution of his decree of 1836, the present plaintiff duly preferred his claim to it under the provisions of s. 246 of Act VIII of 1859; but this claim was

(1) 6 B. L. R., 725. (2) *Id.*, 721.

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Das Baboo (1). The leading case, so far as report is concerned on the point, is that of *Sheikh Wahid Ali v. Mussamut*

disallowed by the Court which was charged with the execution of the decree. And thereupon the plaintiff brought this suit.

I cannot help thinking that there has been very much of a blunder made in these execution-proceedings, and that by reason thereof the plaintiff has been placed in a false position. He and his predecessors have, by the admission of the defendant, been in the enjoyment of this property as of right for nearly forty years; and it cannot be just that, because the defendant has chosen to seize it in execution of a decree against a third person, the plaintiff should be reduced to the necessity of bringing an action to defend his possession, and for that purpose to prove his title, as if he were seeking to get it out of the hands of one who was *de facto* holding it with a presumptive show of right. The truth is, as it seems to me, that the Court which issued process of execution, misapprehended its duty in that respect. The decree of 1836 was passed against certain defendants, including, I suppose, Nusseerut, not as persons individually liable thereunder, but as representatives of Shahamut; consequently, by the present law which regulates the execution of decrees, and which did so in 1866, the decree could be executed only by the attachment and sale of property of the deceased Shahamut, unless the defendants failed to satisfy the Court that they had duly applied all such property of the deceased as was proved to have come to their possession, in which case the decree might be executed out of property belonging to the defendants to the extent of the deceased's property proved to

have been not properly applied by them (see s. 203, Act VIII of 1869). Now, in 1866, when the decree was sought to be executed, Shahamut had been dead upwards of forty years; and it is literally absurd to talk of there being at that time any property seizable as belonging to him. It remained, then, to the execution-creditor to establish that, on the death of Shahamut, property of his passed to the defendants, which had not been duly applied by them. Upon his succeeding in doing this, he would become entitled to ask for the attachment and sale of an equal amount of property belonging to the defendant or defendants, whom he had shown to be guilty of such misapplication. It does not appear that any step of this nature was taken, and, therefore, no foundation has been laid upon which the execution-creditor could base his claim to seize the right, title, and interest of his judgment-debtors in any property. Under this view of facts, he ought not to have been allowed to seize and sell Nusseerut's rights and interests in the property which is in suit. But, moreover, when the decree against Nusseerut and others, representatives of Shahamut, was sought to be executed in 1866, Nusseerut himself had long been dead, and even, supposing that his own property was originally liable to satisfy that decree, it had by his death passed to other hands, and effectually changed owners. The execution-creditor's sole resource would therefore be the property of Nusseerut's representatives, on the like hypothesis as to misapplication, if property of Nusseerut

Jumayi (1). In that case, where a suit had been brought by the party complaining of the wrongful sale of a property

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rut came to their hands, as was made in the case of Nusseerut, when treated as representative of Shahamut (ss. 210 and 211 of Act VIII of 1859); and it is not pretended that any enquiry has been held as to whether or not any assets of Nusseerut ever came to the hands of his representatives now on the record; and, if so, to what extent they were rightly applied. The truth is, that a mistake has been made in considering that certain provisions of Act VIII of 1859, relative to obtaining execution of a decree against a living judgment-debtor, are applicable where execution is sought after the judgment-debtor is dead. While the man is alive, property belonging to him may be in the hands of others than himself, and hence the necessity of some such provisions, as those of s. 246, for the purpose of preventing evasion and fraud. But by the fact of the debtor's death his property passes from him. It may be that it will, in the hands of the transferee, remain still liable to satisfy the deceased's debts; but if so, the transferee for the same reason becomes the representative of the deceased for the payment of those debts, and the proper mode of getting at such property of the deceased as he holds, is to put him on the record in the place of the deceased in the ordinary mode, which would necessitate the establishment of his representative character, or, else, to bring a regular suit against him. There is no ground for treating him as if he were holding *benami* for the dead man, and therefore no ground for acting as if s. 246 applied.

With these views and, indeed, on the state of the case as it is disclosed by the representations of both sides, it

seems to me that this suit should be dealt with as if the defendant were in the position of plaintiff seeking to establish a right to follow the assets of Shahamut into the hands of the present holder, and to take them in satisfaction of Shahamut's debts. The *onus* is on him to make out that he has an equitable right to this property, which originated either at the death of Shahamut, or which sprung up in consequence of the decree against Shahamut's representatives, and has survived the alienations of the last thirty or forty years, so as to enable him to assert it against the present plaintiff. It is obvious that a task of this kind is not likely to be an easy one under any circumstances. But in this case the defendant's own story entirely cuts the ground from under him. He does not pretend that there is in the plaintiff's hands any property, which can be unconditionally taken in satisfaction of a decree against either Shahamut or Shahamut's representatives. All he says amounts to this, namely, that the right of Nusseerut to redeem the property in suit is still alive; that this right to redeem, considered as a beneficial interest in the land, is liable to be taken in execution of the decree against Shahamut's representatives; that it has been so taken; and that he has bought it. I need not point out that even if all this be correct, it does not give the defendant a title to the property which is the subject of contest. According to this, his own account, he has bought nothing which the plaintiff has. He has only purchased the right to stand in Nusseerut's shoes. At

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belonging to her, and in her possession under the circumstances contemplated in s. 246, the plaintiff Mussamut Jumayi, having been the representative of the original debtor, but claiming to hold the land in dispute in her own right, the Chief Justice, with the concurrence of the majority of the Court, held that the suit would lie, and that, in a certain sense, Mussamut Jumayi had not been a party to the original suit. It appears to me that in all those cases some confusion, and a great deal of refining, have arisen out of the curious practice in the mofussil of suing a defendant in some "capacity" as it is called. The Civil Procedure Code in s. 26 prescribes, that amongst the particulars which a plaint is to contain are the name, description, and place of abode of the defendant, and, in the body of the plaint, the circumstances out of which the liability of the defendant is to be established must be set forth. It seems to me very inconvenient that the defendant should be described as holding some capacity. Where a suit is brought under s. 203 of the Procedure Code against the representative of a deceased person, it seems to me that the defendant should be described as stated in s. 26, and the plaint should contain an allegation that he is the representative of such a deceased person, and the suit is brought against him as defendant on that account: and if the particulars in the plaint are made out, a decree will pass against him under s. 203. S. 210 provides:—"If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be made against the legal representative or the estate of the person so dying as aforesaid;" and s. 211 says:—"If the decree be ordered to be executed against the legal representative, it shall be executed in the manner provided in s. 203 for the execution of a decree for money to be paid out of the property of a deceased person." It seems to me that the present case is one falling precisely under those terms. It was sought to

most, this gives him a right to sue for redemption, and he has no sort of claim to the judgment in this suit. not to interfere with the decision of the Lower Appellate Court, and that this appeal should be dismissed with costs.

For these reasons, I think, we ought

execute the decree, originally obtained against Abdool Ali, against Ameerunnissa as one of his legal representatives, and such application was, and must have been, based upon the ground that Ameerunnissa was in possession of property belonging to the estate of Abdool Ali, which property, accordingly, the Court was asked to attach with a view to sale. Ameerunnissa's answer to that application being that she held that property, not as the legal representative of Abdool Ali, but in her own right, it appears to me that that has been mistakenly termed a setting up of a claim under s. 246, whereas it was in reality the answer of Ameerunnissa to the execution-creditor's application. This being a view different from that taken in previous cases by this Court, we should have been under the necessity of referring the matter to a Full Bench, if it were not for the decision of the Judicial Committee in the very case of *Chowdry Wahed Ali v. Mussamat Jumae* (1), in which an appeal was made against the judgment of the Full Bench already referred to. In that judgment their Lordships say that "they are unable to assent to some of the reasons on which the High Court have founded their judgment." They proceed:—"It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he had received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made, during the progress of the execution-proceedings founded upon such decree:" and I should mention, it appears to me, that they should be ascertained directly under application under ss. 210 and 211.

Their Lordships then intimate that they would not have upheld the judgment of the High Court if it rested upon such a ground alone, but that they consider there are other grounds upon which the judgment can be supported, and they proceed to state what those were. The learned Counsel for the respondent represented to us that, in these circumstances, the observa-

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tions of their Lordships in the Judicial Committee as to whether a party in a representative character is a party to the suit, ought to be dealt with as *obiter dicta*, and he stated that the Lords of the Judicial Committee themselves have intimated that they do not desire that any observations thrown out by them in the course of judgment, in regard to matters which are not necessary for the decision of the case in which that judgment is given, should be used as authoritative opinions. I can only say that I should have some hesitation in so dealing with observations deliberately made by their Lordships on a point directly arising in the case, though not, perhaps, necessary to the decision. It appears to me that in that particular case the Judicial Committee had absolutely declared that the judgment of the High Court could not have been supported but for other facts, which they proceeded to state. Be that, as it may, I think at least the expression of opinion by the Judicial Committee does so far relieve us from the weight of authority of previous decisions of this Court, that we may venture to act upon our own view in this case. I have said that this case appears to me to come under ss. 210 and 211. Another reason which makes me think that the case is not one under s. 246, is that the first sentence of that section appears to exclude such a case as this. It says:—"In the event of any claim being preferred to, or objection offered against, the sale of lands, or any other immoveable or moveable property, which may have been attached in execution of a decree, or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers, as regards the summoning of the original defendant, as are contained in s. 220." Surely that section could never have been intended to apply to cases in which the objector was the original defendant. That seems to show, I think, conclusively, that where a party claiming in her own right, although sued in a representative capacity as it is called, has had a decree passed against her under s. 203, in that case any objection of her in her personal

right to the property could not be dealt with under s. 246. As the proceedings under ss. 210 and 211 are to be dealt with in the same manner as those under s. 203, it appears to me that the same principle applies. That being so, the case appears to come clearly under the terms of s. 11, Act XXIII of 1861, and to be one of those questions between the parties to the suit, and relating to the execution of decree; which are to be determined by the Court executing the decree, and which are not to be the subject of a regular suit.

It may be said that a claimant under s. 246 sets up an affirmative case, while a judgment-debtor under s. 203 or s. 210 sets up a negative case; but this is a shadow and does not affect the real substance of the matter. I think, therefore, that in this case an appeal lies; and if an appeal lies, we must consider whether the matter has been properly dealt with by the Court below. It appears to me that it has not been so dealt with; that the real issue in the case has been misconceived; and that the Subordinate Judge has declined to enter into the evidence which was quite material on the subject to be decided. I think the best course would be to frame the proper issues ourselves, and send them to the lower Court for finding thereupon. Accordingly, we frame the following issue:—

Whether the property which has been attached, and which is admittedly in the possession of the appellant, is a property which came into her possession as part of the estate of the deceased Abdool Ali? On this issue the parties will be at liberty to offer any evidence they think fit.

Appeal allowed.

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*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Glover, and
Mr. Justice Mitter.*

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L. P. D. BROUGHTON, ADMINISTRATOR-GENERAL OF BENGAL, AND EXECUTOR APPOINTED UNDER THE WILL OF THE LATE ABRAHAM POGOSE (DEFENDANT) v. J. G. N. POGOSE AND ANOTHER (PLAINTIFFS).*

*Armenian Will—Construction—Devise—Absolute Estate—
Estate for Life..*

An Armenian by his will in the Bengali language made a gift to his son in the following terms:—"I bequeath to A as *salamati* my talooks (which he named) and Rs. 6,000 in cash. He shall enjoy the profits of the aforesaid talook. On his demise his sons shall get. The mooktears shall make over to the satisfaction of A." *Held* that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. A took an absolute estate under the devise.

NICHOLAS MARCAR POGOSE, an Armenian resident of Dacca, and a member of the Armenian church, by his will, made in the Bengali language, and dated the 22nd Aghran 1236 (5th December 1829), appointed his two sons, Gregor and Petrus, mooktears, in respect of all his estate and effects whatsoever, and, subject to certain specific gifts and legacies, devised and bequeathed to them, and on their deaths, to their sons, all his moveable and immoveable property, in the following terms:—

"I bequeath to Gregor Baba a moiety of my entire properties, moveable, immoveable, &c., aforesaid, save and except the amount of *salamati* and other expenses; and the other moiety to Petrus Baba. They shall not be at liberty to make alienations by sale or gift. They shall enjoy the profits. On their demise their sons will become proprietors of the shares of their respective fathers."

Among other provisions in the will were the following:—

"3. I have, during my life, allowed maintenance to my wife and sons. I have no concern whatever with their debts of any description. They shall not be at liberty to sell, or cause to be sold by auction, my properties immoveable for their debts.

* Regular Appeal, No. 112 of 1872, from a decree of the Judge of Dacca, dated the 15th February 1872.

"4. My sons shall give to my wife Catherine Bebee the sum of Rs. 25,000 as *salamati* (gift), the large one-storied house in Sacheepandoripa, formerly occupied by Amsooddee Buksh, and her own jewels and articles as may be forthcoming, and Rs. 200 per month by way of maintenance. They shall not demand rent of my purchased house occupied by my eldest daughter Mussamut Madalook Bebee, widow of the late Pitrus Manook, during her life. My mooktears shall pay for the repairs of the said house. She shall get Rs. 30 per month by way of maintenance, and the Howla, which used to be recorded as comprised in Joar Rutundee, as long as she lives. Her son and daughters shall receive as *salamati* Rs. 3,000 at Rs. 1,000 each. My second daughter Shachee Bebee, and her husband Johannes Manook with her son, shall get Rs. 11,000 as *salamati*. My youngest daughter Woochoo Bebee, and her husband Lucas Gregor, shall receive Rs. 5,000. They (the mooktears) shall pay to Sreemutty Chumam, wife of my son Gregor, a *salamati* of Rs. 1,000, and to Sreemutty Akchapur, wife of Petruse Baba, a *salamati* of Rs. 600. They shall pay Archbishop Pogose a *salamati* of Rs. 3,000, and to Sreejoot Daor Mookurun, minister of our Dacca church, a *salamati* of Rs. 500; and shall purchase a house, or land, of the value of Rs. 5,000, for the expenses of the holy church, so that the minister of the church for the time being, who may offer grand mass in my name every Wednesday, may be paid out of the profits thereof."

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Then came the following bequest to Abraham, or Abram, Pogose, an illegitimate son of the testator, with reference to which the present suit was brought:—

"I bequeath to Abram Baba as *salamati* my talook Joar Narain Pasha, in the district of Backergunge, and Joar Shinghosree and Shakchoota, and Kismut Bhoosa Barree, together with Bangalkandee and Nagorkandee, in the district of Mymensingh, and Rs. 6,000 in cash. He shall enjoy the profits of the aforesaid talook. On his demise his sons shall get. The mooktears shall make over to the satisfaction of Abram Baba."

In a subsequent part of the will was another bequest to Abraham, which ran as follows:—

"I bequeath to Abram Baba as *salamati* the one-storied house which I am getting constructed immediately on the north of the road in Mohulla Pakertolee, formerly belonging to Johannes Manook."

At the time of his father's death, Abraham Pogose only had

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an illegitimate son, named Gabriel, who subsequently died, leaving five children.

Abraham Pogose died, having made a will whereby he purported to deal as absolute owner with the property left him by his father, and whereof he appointed the defendant executor, and the defendant in that capacity took possession of his estate.

The present suit was brought by the sons of Gregor and Petrus Pogose against the defendant as such executor for possession of, or a declaration of their title to, the property mentioned in the first devise to Abraham, on the ground that, under the will, Abraham took only a life-estate, the devise over being inoperative as he died without issue.

The defendant, on the other hand, contended in his written statement that the devise to Abraham Pogose was an absolute and valid gift, without any reservation for the testator and his heirs of any right or interest in the property devised; that the words of the devise over were mere surplusage; that the statement that Abraham Pogose died without issue was incorrect, inasmuch as Gabriel Pogose had been acknowledged and recognized by the testator in his lifetime as the son of Abraham; that the testator had no intention to exclude Gabriel from the inheritance, but meant to refer to him in the devise over to Abraham's sons; and that there was nothing in the will to prevent Abraham Pogose from conveying away the properties devised to him as *salamati*, or from disposing of them by will.

The Judge of Dacca dismissed the plaintiff's suit, holding that Abraham had only an estate for life under his father's will, and that inasmuch as he died without legitimate issue, the devise over to his sons failed.

From this decree the plaintiff appealed to the High Court.

Mr. *Woodroffe* (with him Messrs. *Berners*, *Sanderson*, and *Upton*) for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) (with him Mr. *C. Gregory* and Baboo *Kalimohun Doss*) for the respondents.

Mr. *Woodroffe*.—Abraham took an absolute interest under the will, the property being given to him as *salamati*, which means an absolute gift or present. The land and the sum

of Rs. 6,000 were given in the same clause of the will, but it is not pretended that Abraham only got a life-interest in the money. Upon the evidence it is clear that the testator and his family treated and spoke of Abraham as the son of the testator, and recognized Gabriel as Abraham's son; and there is nothing either in the evidence, or in the will, to show that the testator intended to give Abraham only a life-estate. The words of the gift over are mere surplusage. The expression "on his demise" is a liberal translation of the words "when he is no more," which occur frequently in Bengali wills where no succession of estates is intended. From the rest of the will, it is clear that the testator well knew how to create a life-estate, witness the gift to his eldest daughter: again in the gift to his sons the testator imposes a restraint on alienation, whereas there is no such restriction in the devise under consideration. The only question in the case is as to the rule of construction to be applied to the will of an Armenian. It is submitted that it must be construed according to principles of natural justice; and not according to the technical rules of English law, *Barlow v. Orde* (1); but even were the latter held to apply, under the rule in *Shelley's case*, Abraham would take an absolute estate.

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The *Advocate-General* for the respondents.—The gift of land to Abraham is cut down to a life-estate by the devise over to his sons, and by the words "he shall enjoy the profits," which amount by implication to a restraint on alienation. When the testator intended to give an absolute interest, he framed his gift in a different way; thus the gift of the Rs. 6,000, although made in the same clause of the will, and the gift of the house in a later clause, are without any words of limitation or restriction. [MITTER, J.—In the case of the bequest to his eldest daughter, the testator expressly gave a life-estate]. A life-estate may be created by the words "for life" or by any other words which indicate the testator's intention that the object of the gift was to take a life-interest only, as for instance "until death," or "on his demise," or "when he shall be no more." Gabriel,

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being illegitimate, would not take as a *puttro* (son) the word used in the will. Christian marriage entails the exclusion of illegitimate children. The fact that the testator knew that Abraham had a son makes no difference; *Godfrey v. Davis* (1); and the use of the plural number in the devise over to Abraham's sons shows that the testator did not refer to Gabriel. In *Barlow v. Orde* (2), the illegitimate children were expressly named. Principles of natural justice may be applied to all relations between man and man arising from contract or tort, but rights of succession and the like must be governed by some substantive law. The Hindu and Mahomedan laws being inapplicable to this case, it must be decided according to the modified form of the English law which constitutes the territorial law of India, *The Secretary of State v. The Administrator-General of Bengal* (3); thus in *Musleah v. Musleah* (4), the English law of inheritance was applied in the case of a Jew who died intestate, with respect to his property in the mofussil.

Baboo *Kalimohun Doss* on the same side.

Mr. *Woodroffe* in reply.—When after a bequest words are used that are repugnant to the gift, they are of no effect—*Doe d. Cotton v. Stenlake* (5). Lord Ellenborough there said:—"The words 'during their lives,' after the devise to the daughter and her heirs, is merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property." Where a testator uses the expression "in case of death," the question is whether he means "at or from," so as to restrict the prior bequest to a life-interest, the general rule being that, where the bequest is simply to a person, and in case of his death to another, that the first takes absolutely (6). In cases like the present, the *lex personalis* must, if possible, be ascertained—*Rewun Persad v. Mussumat Radha Beeby* (7). Though the opposite of this

(1) 6 Ves., 43.

(2) 5 B. L. R., 1.

(3) 1 B. L. R., O. C., 87.

(4) 1 Boul., 234.

(5) 12 East., 515, at p. 517.

(6) 2 Jar. on Wills, 3rd ed., 703.

(7) 4 Moore's I. A., 137.

seems to be laid down by Markby, J., in *The Secretary of State v. The Administrator-General of Bengal* (1), but it would appear that Markby, J., went much further than was necessary in that case, and his opinion is inconsistent with expressions of the Privy Council in *Abraham v. Abraham* (2).

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The judgment of the Court was delivered by

COUCH, C.J. (who, after stating the facts shortly, proceeded):—
The question between the parties depends upon the construction which is to be put upon the will of Nicholas Marcar Pogose.

As there seemed to be some doubt whether the translation of the will in the paper book was accurate, we have had the will again translated.

The terms of the bequest to Abraham Pogose are as follows:—
(His Lordship read the clause, *ante*, p. 75, and continued).—
We have to construe this will according to equity and good conscience. The testator does not appear to have been a person whose will would have to be construed according to the English law, and the rule I think we ought to accept is, that, unless a contrary intention appears, we should consider that the estate given is an absolute one. That is the rule which has been made the law of England by the Legislature in the Wills Act, and it is admitted by all persons to be a most salutary canon of interpretation of wills. The fact that the Legislature has considered it right to enact it as a rule of interpretation in England speaks most strongly in its favor; and it has been adopted in this country with regard to certain wills by s. 23 of Act XXV of 1838. Certainly, when we have to construe a will made by this person, we ought not to apply the technical rule of English law that, where there were no words of inheritance, the estate was only to be a life-estate.

Then, applying to what the testator has said the rule, that we must consider the estate to be absolute until a contrary intention appears, let us see whether it can be said that a contrary intention appears. He bequeaths the talooks, and Rs. 6,000

(1) 1 B. L. R., O. C., 87.

(2) 9 Moore's I. A., 196.

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in cash. If we stop here, we cannot say that his intention was anything else than to give the property absolutely; because we cannot suppose that he intended to give the Rs. 6,000 in cash otherwise than absolutely. He did not intend to give only a life-interest in it, and yet it is in the same bequest as the talooks. We should not be justified in saying that, when he included all in one bequest, he meant by the words "I bequeath" to give the talooks for life only, and the cash absolutely. The fair meaning of this part of the bequest seems to me to be that he intended to give, and considered he was giving, the property absolutely to Abram Baba, who apparently was his natural son.

Then, do the words which follow, "He shall enjoy the profits of the aforesaid talook, on his demise his sons shall get," show an intention to limit the gift, which had been made in the previous part of the sentence, to a life-estate?

It appears that, when the will was made, Abraham Pogose had only one son, and that apparently not legitimate. The testator may have intended to include him by the term "sons," but apparently he did not intend this particular son to be the sole object of his bounty. If he had, there might have been some pretence for saying that he meant the property to be enjoyed by the father for life, and afterwards by the son. But he says that after his demise "his sons shall get," referring to the succession which after Abraham Pogose's death would naturally take place, if he did not part with the property in his lifetime, which the testator probably thought was not likely to happen. I think these words, instead of showing an intention on the part of the testator to give to Abraham Pogose the talooks for his life only, and make a gift by the will to such sons as Abraham Pogose should have, only describe what the testator thought would really follow from what he had done.

The case which Mr. Woodroffe quoted, *Doe d. Cotton v. Stenlake* (1), resembles the present. There it was a devise to a daughter and her heirs during their lives: and it seems to have been contended that the devisees were to take life-interests in succession, but Lord Ellenborough said that he considered the

words were merely the expression of a man ignorant of the manner of describing how the parties, whom he meant to benefit, would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit for their lives. I think we cannot say that there is, in this will, an expression of an intention that Abraham Pogose should take other than an absolute estate in this property.

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It is true that, in a subsequent part of the will, there is another bequest to him of a house. It is:—"I bequeath to Abram Baba as *salamati* the one-storied house which I am getting constructed immediately on the north of the road in Mohulla Pakertolee, formerly belonging to Johannes Manook." Here there are not such words as were used in the previous bequest. But I do not think that the omission to say anything, in that part of the will, about the taking the profits for his life, is sufficient to lead us to think that, in the former part, those words were introduced with the intention of creating a life-estate only. There seems to be no reason for thinking that the testator intended to make any such distinction between the two properties which he was bequeathing to Abraham Pogose. That he, or the person who drew the will for him, was acquainted with the expression "during the life," and might have used it if the intention had been to give only a life-estate, is clear from another part of the will, where the words, "during her life-time," are used with reference to a gift to his daughter.

I think, therefore, applying to this will what I have said I consider to be the rule of interpretation which a Court of Equity ought to adopt, that the estate was an absolute one, and that the plaintiff's suit must consequently be dismissed. The decree of the lower Court will be reversed, and the plaintiff's suit dismissed with costs in both Courts.

As Mitter, J., is not present, I have to add that he concurs in this judgment.

Appeal allowed.

Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
June 4.

BIBEE SOHODWA AND OTHERS (PLAINTIFFS) v. M. SMITH,
(DEFENDANT).*

Right of Occupancy—Zemindar and Ryot—Ryot's Power to transfer—Mesne Profits.

A right of occupancy, which is not transferable, is merely a right on the part of the person entitled to it, to occupy and till the soil either by himself or by persons dependent on, or subordinate to, him, *e.g.*, his servants, lessees, or licensees. Therefore, where a non-transferable right of occupancy was transferred, and the transferee was in actual possession of the soil, tilling and using it for his own benefit: *Held* that the zemindar had a right of suit against the transferee to recover possession of the land.

He was also entitled to recover as damages so much of the zemindar's rents and profits as the defendant had, while in possession, been the means of preventing the zemindar from receiving.

THIS was a suit for possession of several parcels of land in Mauza Gopaulpore. In the plaint it was alleged that Mussamut Sohodwa, the principal plaintiff, was the *malik* of an eight annas *patti* in Mauza Gopaulpore; that she formerly let it in *ticca*, for a term of years which expired in 1272 (1865-66), to one Chowdry Jugdeo Narain Sing, and that the defendant became a *katkinadar* under him; that the defendant, taking advantage of his position as *katkinadar*, contrived, during the existence of the *ticca* lease, to get possession of the lands in dispute, and procured *kabalas* to be executed in his favor by the ryots, which *kabalas* purported to convey to him the right of cultivation, but it was alleged these *kabalas* were inoperative to transfer to him any right to the soil for four reasons: 1st, because the right of cultivation of the tenants was not transferable; 2nd, that the ryots who executed the *kabalas* had no right of occupancy; 3rd, that the right of cultivation could not be transferred without the permission of

* Special Appeal, No. 777 of 1872, from a decree of the Officiating Judge of Tirhoot, dated the 5th February 1872, reversing a decree of the Subordinate Judge of that district, dated the 27th July 1871.

the landlord; and 4th, that some of the ryots, who had executed the *kabalas* in favor of the defendant, were not ryots or occupiers of land within the *patti*. It was further stated that the defendant ought to have ceded possession of the property on the determination of Jugdeo's term, but that he refused, when required, to give possession to the plaintiffs, and that he remained in wrongful possession. The plaintiff sought to set aside the *kabalas* and to recover possession of the lands in dispute with mesne profits. The defendant, while admitting that he was in actual possession of the land, and also admitting the title of the principal plaintiff as alleged by her and the termination of the *ticca* lease, stated that he obtained possession of the land by virtue of the *kabalas* which the plaintiffs questioned, and he maintained that these gave him a good title to cultivate the soil, and to retain possession against the plaintiff.

In support of his contention that the ryots, his vendors, had transferable rights, the defendant, besides, parol evidence, put in certain original pottas under which some of the transferring ryots claimed rights of occupation, and also put in a number of sale certificates, which, however, were with respect to sales in execution at the instance of the zemindar.

The Subordinate Judge held that only three of the defendant's vendors had a right of occupancy, and that only over a small portion of the land in dispute, and that such right was not transferable. He accordingly passed a decree in favor of the plaintiffs.

On appeal the Judge held that the vendors of the defendant were ryots who had rights of occupancy, which were transferable, over all the parcels of land in dispute; that the pottas and receipts filed by defendant proved the case set up by him; that the sale of the tenures did not create a forfeiture; and that the plaintiff could continue to look to the defendant's vendors for rent, but was not entitled to recover possession of the land. He accordingly dismissed the plaintiff's suit.

The plaintiffs appealed to the High Court.

Mr. Woodroffe (Mr. C. Gregory and Baboo Chunder Madhub Ghose with him) for the appellants.

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The *Advocate-General*, offg. (Mr. Paul) (Mr. Twidale and Moonshee Mahomed Yusoof with him) for the respondent.

Mr. Woodroffe contended that a right of occupancy was not transferable—*Ajoodhya Persaud v. Mussamut Imam Bandi Begum* (1). The plaintiffs are entitled to eject the defendant as he is holding without any right—*Suddye Purira v. Boistub Purira* (2). There was no evidence to show that a right of occupancy is transferable by custom, or can be sold without the zemindar's consent. The certificates of sale put in relate to sales held at the instance of the zemindar.

The *Advocate-General*.—The plaintiffs have not proved their title to recover khas possession. There is no evidence of relinquishment on the part of the ryots who sold their tenures to the defendant. Sale of a tenure is not an abandonment or relinquishment of a jote. It is only upon the relinquishment of a jote that a zemindar is entitled to khas possession. If the ryots had sub-let the lands in dispute, the zemindar could not have sued for khas possession. If according to law nothing has passed under the sale, then the tenure is in

(1) Case No. 2609 of 1866, 31st May 1867.

(2) Before Mr. Justice Kemp and Mr. Justice Glover.

The 10th March 1870.

SUDDYE PURIRA AND OTHERS
(PLAINTIFFS) v. BOISTUB PURIRA
AND OTHERS (DEFENDANTS).*

Baboo Umbica Churn Banerjee for the appellants.

Baboo Mohindro Lal Mitter for the respondents.

The judgment of the Court was delivered by

KEMP, J.—We think there is no ground for this special appeal. The plaintiff has got a decree in both Courts to the effect that the transfer of the tenure by the defendant, who was his ryot, to a third party, was invalid, inasmuch as it was not a transferable tenure, and was made without the consent of the plaintiff, the superior holder. The plaintiff is therefore entitled to look to the former tenant for the rent; and as the parties revert to their former status, he is not entitled to khas possession. He is simply entitled to look to the former tenant as the party liable for the rent, and not the transferee. The appeal is dismissed with costs.

* Special Appeal, No. 2290 of 1870, from a decree of the Judge of Cuttack, dated the 29th June 1870, modifying a decree of the Munsif of that district, dated the 19th February 1870.

existence, and consequently the zemindar has no right to recover khas possession. [AINSLEY, J.—Has not the zemindar a right to put the defendant to the proof of his title?] The zemindar can have no such right in this case, as the ryots who have sold their tenures to the defendant have still an existing right to hold the land.

Mr. *Woodroffe* in reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the nature of the suit and pleadings as above, continued).—In the situation thus taken up by the parties to the suit, it became incumbent on the defendant to prove—

1st.—The *factum* of conveyance to him of the right of cultivation upon which he relies.

2nd.—That the conveying parties respectively possessed such a right of cultivation, as they could lawfully transfer to him without the assent of the zemindar.

A preliminary question was raised at the trial, namely, whether on the allegations of the plaintiff she had any right at law to claim possession of the land from the defendant. It was argued in substance that the transfer by the ryots of their occupation rights to the defendant, even if illegal, did not amount to abandonment of the soil; that at most it was a void and inoperative act, a mere attempt to transfer, and that, consequently, so far as the plaintiff was concerned, the transferring ryots were still in occupation of the soil, and responsible for the rents; if it suited them for any reason to give the defendant leave and license to use their land, the plaintiff could not complain.

As the authorities stand, this question seems to be one of some nicety, and in considering it there is need to bear in mind that the relations between the zemindar and the ryot are not generally the same as those between the English landlord and tenant. No doubt, the zemindar has been made by legislative enactment the proprietor of the land which forms his zemindari; and as regards his *khamar*, *nijjote*, or *seer* land, it may be taken that the cultivator of the soil has generally no other rights than those which he obtains, as a tenant, by contract with the zemindar; but with regard to the ryotti lands, which constitute the

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bulk of the zemindari, it is much otherwise. There, while the zemindar is still proprietor of the land, the ryots of the village, as the combined effect of custom and legislation, have in most, if not in all, cases, some right to cultivate the ryotti land of the village, which is altogether independent of the zemindar, and which, in the case of a ryot having a right of occupation, is a right to occupy and use the soil quite irrespective of any assent or permission on the part of the zemindar. This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zemindar by the Legislature, but is, as I understand, in derogation of, and has the effect of cutting down and qualifying, that right. I may say that, in my conception of the matter, the relation between the zemindar's right, and the occupancy ryot's right, is pretty much the same as that which obtains between the right of ownership of land in England, and the servitude or easement which is termed *profit à prendre*; although I need hardly say the ryot's interest is greatly more extensive than a *profit à prendre*. It appears to me that the ryot's is the dominant, and the zemindar's the servient right. Whatever the ryot has, the zemindar has all the rest which is necessary to complete ownership of the land; the zemindar's right amounts to the complete ownership of the land, subject to the occupancy ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zemindar all rights and privileges of ownership which are not inconsistent with, or obstructive of them. And amongst other rights it seems to me clear that he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it.

Starting from this position let us return to the question proposed. Do the facts upon which the plaintiff relies constitute a good cause of action against the defendant? It seems to me that they do. According to those facts the defendant is in actual possession of the soil, tilling and using it for his own benefit, and he has got himself into that situation under color of an alleged transfer to him, effected by certain ryots of their right

to have possession of, and to use, the soil for their own benefit; but upon the plaintiff's case, these ryots had no power to make such a transfer of their right, and, therefore, so far as title in himself is concerned, derived through this transfer, the defendant clearly has no right to the possession. Then, can the defendant say that, as regards the plaintiff, the transaction of transfer, although it failed to pass any right to the defendant himself, yet served to place the defendant's possession under the protection or sanction of his grantor's rights? I think not; because I cannot extend the mere right of occupancy beyond the right, on the part of the person entitled to it, to occupy and till the soil, either by himself, or his servants, or by his lessees or licensees, *i.e.*, at the furthest, by persons who are in some degree subordinate to him, and under his control, throughout the whole time of the possession. Now it is very plain on the plaintiff's facts, that, as between the defendant and his grantors, the defendant cannot possibly be in any degree dependent upon them in the matter of the possession, because he has obtained from them a complete transfer of all their rights. It appears to me almost absurd to hold that a zemindar in such a case as that made by the plaintiff, where no matter of estoppel occurs, is obliged to treat the possession of one, who is, and whom he knows to be, entirely free of all dependence upon his ryot, as being the possession of that ryot; and I think I could, if it were necessary, show that serious mischief might in practice ensue from the application of this doctrine. Thus, on the plaintiff's facts, I arrive at the conclusion that the defendant has no title himself to the occupation of the soil, and that his occupation of it cannot be justified by the force of his grantor's title. Therefore in my opinion the defendant is an entire stranger to the soil, and a trespasser; and the zemindar, as owner, has a plain right to evict him, in order to protect the possession, if in so doing he only exercises a right of ownership, which is not in conflict with the ryot's right of possession. Then does the act of recovering back the possession from a stranger, who, as against the zemindar, is wrongfully holding it, conflict with the right to that possession on the part of the ryot, who has voluntarily parted with it? It appears to me plainly not; for the

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only right, if any, which, under the circumstances, theyot can have left to him, is to regain the possession from the zemindar after the latter has recovered it from the stranger; because he certainly could not himself recover it from the stranger to whom he had transferred it for valuable consideration. And if he had no right, as against the zemindar, to transfer the possession, surely no right of his to the possession can be infringed by the zemindar's claiming the possession from the transferee, though, possibly, on being obliged to refund the purchase-money, he may turn to the zemindar, and successfully maintain that his ineffectual attempt at transfer did not cause him to forfeit his original right to occupy the land.

This view accords with the judgment of the late Norman, J., in *Hurrehur Mookerjee v. Jodoonath Ghose* (1), and is not opposed to the judgments in *Joy Kishen Mookerjee v. Raj Kishen Mookerjee* (2) and *Suddye Purira v. Boistub Purira* (3).

I think, therefore, on the whole, for these reasons, that the plaint does disclose a cause of action upon which the plaintiff may seek to recover, as against the defendant, possession of the land which is the subject of suit.

As regards the mesne profits, or rather damages for mesne profits, of course they must be estimated by the loss which the zemindar may be shown to have sustained by reason of the wrongful possession of the defendant, if wrongful possession be made out. That will not be loss of the profits of a cultivator; because at no time during the dispossession was he, as I understand, entitled to the soil for the purposes of his own cultivation. The damages must be as much of the zemindar's rents and profits as the defendant may, during the time he had been in possession of the land, have been the cause of preventing the plaintiff from receiving.

Then, as to the other issues which I have mentioned, the lower Appellate Court has come to the conclusion that the defendant has established both of them. The Judge says that he arrives at the conclusion that the transfer from the ryots to the defendant, upon which the defendant relies, are proved; and, also, that these ryots had tenures which they were capable of

(1) 7 W. R., 114.

(2) 5 W. R., 147.

(3) *Ante*, p. 84.

transferring. But it appears very clear that, in dealing with the evidence, the lower Appellate Court very seriously misapprehended the force of a considerable portion of it. I refer to the evidence of sales held in execution of decrees, the evidence consisting partly of parol testimony, and partly, I believe, of certificates of sales. But in all these instances of sales, so far as they have been brought to our notice, the sales were sales in execution, effected at the instance of the zemindar himself, and, consequently, they could not be evidence of the right, on the part of the ryots, to transfer without the assent of the zemindar. Therefore it seems that the lower Appellate Court was wrong in considering that the right to transfer these jotes, upon which the defendant relied, was made out by evidence of this kind. There was also other evidence, namely, the evidence afforded by the original pottas, which some of the transferring ryots seem to have put in as being the pottas under which they held their occupation rights. As the lower Appellate Court represented them, these pottas contained a clause giving a power of transfer; and if that be so, of course the pottas, when proved to be authentic, would be conclusive evidence in support of the defence which the defendant set up.

But we have it also shown to us that these pottas were held not to have been proved in the first Court, and there was some doubt thrown out how far there was evidence on the record to prove them. The lower Appellate Court, therefore, seems to have fallen into error in assuming that these pottas were good evidence in support of the defendant's case, without giving any attention to the means by which the defendant had proved them to be authentic.

Under these circumstances we think that the finding of the lower Appellate Court, upon which its judgment is based, cannot be depended upon, and that the judgment must be reversed, and the case sent back to the lower Appellate Court for re-trial of the question whether or not the persons, from whom the defendant claims to have obtained the land in suit by transfer, had, as against the zemindar, a right to transfer without his assent.

Costs will abide the event.

Appeal allowed.

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Before Mr. Justice Phear and Mr. Justice Ainslie.

1873
May 17 &
June 20.

MAHABEER PERSAD (PLAINTIFF) v. RAMYAD SINGH AND OTHERS
(DEFENDANTS).*

Hindu Law—Mitakshara—Ancestral Property—Alienation by Father—Share of Mother on Partition.

A, the *karta* of a Hindu family, governed by the Mitakshara law, living with his two sons *B* and *C* in joint enjoyment of the family property, took a loan from certain persons, and executed to them a mortgage by bond on the joint family property. The bond-holders obtained a decree on their bond, in execution of which they caused the property to be sold, and themselves became the purchasers. *C* was a minor at the time of the alienation. In a suit by *B*, on behalf of himself and *C*, to set aside the alienation, on the ground that it had been made without their consent and without legal necessity, the Court found that *B* had taken such a part in the transactions leading to the alienation as made him a consenting party to it; that there was no legal necessity for the alienation; and that *C* being a minor, the alienation was not the joint act of all the members of the family :

Held, that under these circumstances the alienation failed to convey to the purchasers either the entirety of the property or any share or interest in it, and *C* was entitled to have it set aside. In ordering the alienation to be set aside, the Court in the interest of the minor son, and favoring the equity the purchasers clearly had against *A* and *B*, directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of *A* and *B* should be jointly and severally subject to the lien thereon of the purchasers for the repayment of the loan to *A*.

So long as a Hindu family under the Mitakshara law is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, no member of the family has any separate proprietary right therein which he can alienate or encumber. The property can only be alienated by the joint act of all the members express or implied; or, in case of justifiable family necessity, by the *karta* alone.

Upon a partition of ancestral property between a father and his sons during the lifetime of the father, the mother is, under the Mitakshara law, entitled to a share.

THIS was a suit brought by Mahabeer Persad, on behalf of himself and his minor brother Sheonund Persad, against Ramyad

* Regular Appeal, No. 209 of 1872, from a decree of the Officiating Additional Judge of Tirhoot, dated the 20th June 1872.

Singh, Sheo Adeen Singh, and Narain Singh, described in the plaint as first party defendants, and Ram Anoogra Singh, the father of the plaintiffs, described as second party defendant, to recover possession of certain property. The plaint stated that the property in question was the ancestral property of the plaintiffs; that, on the 14th December 1867, Ram Anoogra Singh, without legal necessity, and without the consent of the plaintiffs, executed a bond in favor of the defendants (first party); that the defendants (first party) brought a suit on the bond, obtained an *ex parte* decree, and in execution thereof, notwithstanding objections made by the plaintiffs, caused a sale of the property to be held, and themselves purchased it, and thereupon took possession thereof; that, according to the Hindu shastras of the Mithila school, both father and son had an equal right in ancestral property; that Ram Anoogra Singh had no right without legal necessity, and without the consent of the plaintiffs, to mortgage the joint property on account of his personal debts; and that the plaintiffs were in no way benefited by the loan taken by Ram Anoogra Singh. The plaint prayed that the bond, the decree obtained thereon, and the sale in execution of the decree, might be set aside, and the plaintiffs be put in possession of the property.

The defendants (first party) stated, *inter alia*, in their written statement that the loan was taken by Ram Anoogra Singh to pay the *zur-i-peshgi* of a *ticca* lease, which was obtained by him on favorable terms from Mussamut Bandhoo Sooklain, for the joint benefit of himself and his sons; that profits were derived from such *ticca* lease, which were applied to the joint benefit of the plaintiffs and their father, and that, under such circumstances, the bond was binding on the plaintiffs; that the transaction of loan was carried on and concluded with the advice and consent of Mahabeer Persad, one of the plaintiffs, and that he, therefore, could not, in equity, be allowed to object to it.

The defendant Ram Anoogra Singh did not appear.

The Judge held that Ram Anoogra Singh had borrowed the money in good faith, with a view to increase his possessions for the benefit of the family. That the plaintiff Mahabeer Persad

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lived, at the time of the execution of the bond, in commensality with his father, and that he consented to his father's management of the family affairs, and that he could not now object to what appeared at the time so profitable an investment as that made by his father. He accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboo *Kaliprosono Dutt* and *Nilmadhub Bose* for the appellants.

Baboo *Anodapersaud Banerjee* and Mr. *Twidale* for the respondents.

Baboo *Kaliprosono Dutt*, for the appellants, contended that, under the Mitakshara law, the father had no power to alienate ancestral property without legal necessity, and without the consent of his sons, the plaintiffs; that the alleged acquiescence of Mahabeer Persad in the alienation, and the transactions effecting it, was not proved; and that even if it were proved, it would not affect the interest of the minor plaintiff. He submitted, therefore, that the alienation should be set aside and possession of the property given to the plaintiffs. He cited—*Nathu Lal Chowdhry v. Chadee Sahi* (1) and *Sadabart Prasad Sahu v. Foolbash Koer* (2).

Baboo *Nilmadhub Bose* on the same side.

Baboo *Anodapersaud Banerjee*, for the respondents, contended that the acquiescence of Mahabeer Persad was proved; that the alienation was for the benefit of the joint family; and that, even if the sale be considered invalid on account of the want of consent of the minor plaintiff, the purchasers were entitled to a refund of the purchase-money.

Baboo *Kaliprosono Dutt* in reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the nature of the suit and pleadings, continued)—At the trial, the defendant (second party)

(1) 4 B. L. R., A. C., 15.

(2) 3 B. L. R., F. B., 31.

did not appear, and it is evident that in this suit there is no real hostility between him and his sons.

We think that the evidence on the record leaves the facts of the case very clear. Ram Anoogra Singh and his two sons, Mahabeer Persad and Sheonundun Persad, have all along been, and still are, members of a joint Hindu family, living in commensality, and enjoying the family property according to the terms of the Mitakshara law. The property which is the subject of suit, was, in 1867, part of that family property, and was, with the remainder of the family property, under the management of the father, as the head of the family and *kurta*. In December of that year, still as head of the family, he took in his own name, from one Mussamut Bandhoo Sooklain (a widow lady), a *ticca* lease of certain mauzas, which seem to have belonged to her for the estate of a Hindu widow, and he appears to have taken them into possession, and to have treated them as part of the family property. To obtain this lease, he was obliged to pay a premium or *zur-i-peshgi* of Rs. 10,000, of which sum he had only Rs. 7,000, in ready money; accordingly, he procured the remaining Rs. 3,000, by borrowing it of defendants (first party), on the mortgage to them by the bond, which is dated 14th December 1867, of the family property, which forms the subject of suit. Mahabeer Persad was admittedly at that time a major, and we are of opinion that he did, as the defendants (first party) allege, take an active part in carrying out, and completing the mortgage transaction, which is impeached by this suit, although, no doubt, his name does not appear on the bond. Several witnesses called by the defendants (first party), whose testimony the Judge believed, and whom we see no reason to discredit, swore positively to his being present when the bond was executed, and to his taking various steps at other times in furtherance of the negotiations for the loan. He does not himself come forward to deny on oath the statements which the defendants (first party) made affecting him in this respect in their written statement; and the only evidence upon which the plaintiff relies to rebut this part of defendants' (first party's) case, is the testimony of two witnesses, who endeavour in a very feeble manner to establish for him an *alibi* on the occasion of the

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bond being executed. The Mussamut lessor died a very few months after the lease was granted, namely, in April 1868, and the reversionary heirs of her husband (as they are designated) resumed the subject of the lease, without paying back any portion of the Rs. 10,000 bonus. The evidence which is on the record does not enable us to form an opinion whether or not the joint family of the plaintiff derived any benefit from the leased property, in the interval between the date of the lease and the date when the lessor died.

It is now by reason of the Full Bench decision in *Sadabart Prasad Sahu v. Foolbakh Koer* (1), and other decisions to which we need not for the moment refer, placed beyond doubt, that as long as a Hindu family under the law of the Mitakshara is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, so long no member of the family has any such separate proprietary right in the property as he can aliene or encumber. The property under such circumstances belongs to all the members of the family jointly, as to a corporation, and no one of the individual members has any share in it, which he can deal with as property. Also, under the same circumstances, the property can only be aliened by the joint act of all the members, express or implied; or, in the event of such a case of family necessity occurring as will, in the eye of the law, serve to invest the *kurta* with authority to aliene as the agent of all, then by the *kurta* alone.

It follows, then, that in the state of facts which we have mentioned as the facts of the present case, inasmuch as no sort of partition of the family property has even yet been effected by the members of the family, and no family necessity existed to justify the taking of the loan by the defendant (second party), and the mortgage by him of the property, and one of the members of the family was at the time of the mortgage a minor, therefore the mortgage of 14th December 1867, together with the decree and sale which followed thereon, failed to convey to the defendants (first party)

(1) 3 B. L. R., F. B., 31.

either the entirety of the property, or any share or interest in it: neither the father, nor Mahabeer Persad, possessed any separate share or right in the property with which they could individually deal; and as Sheonund was a minor, all the members could not join to convey the entirety, and as there did not exist any family necessity to justify the mortgage or sale, the *Kurta* alone could not aliene.

Thus it seems pretty clear, that the minor son at any rate, or rather a next friend on his behalf, is entitled to ask the Court to declare that the mortgage, the decree, and the sale were void of effect, and on that declaration to recover the property for the family.

If it had appeared that any profits had been in fact derived by the joint family from the property taken in lease, then it would have been a question whether or not the decree for possession ought not to be made conditional on the refund of the mortgage-money, notwithstanding that the mortgage transaction, strictly speaking, gave the defendants (first party) no legal title to the property. This, however, as we have already said, has not been established, and therefore the only question remaining is whether or not for any other reason a condition should be imposed upon the recovery of the property. For the moment, then, let us reflect upon the consequence of allowing the property to be recovered by the minor unconditionally. The property is still family property, and it is recovered at the instance of the minor solely, because the father who affected to mortgage it, and the eldest son who acted with him and aided him in the transaction, could neither singly nor together pass any title to the entirety, or to any share in it, consequently, the property on going back, will come to be enjoyed by the joint family as it was before the mortgage and sale; and of necessity by virtue of the provisions of the Mitakshara law will return to the management of the very man, defendant (second party), who obtained Rs. 3,000 from defendants (first party) on the pretended security afforded by the mortgage of it. This does not seem to accord very well with equity or good conscience.

Now it is to be observed that the Full Bench, in the case

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of *Sadabart Prasad Sahu v. Foolbask Koer* (1), while it answered in the affirmative the question put to it whether or not Bhagwan Lal's nephew, was entitled to recover the joint family property for which he sued,—namely, that which Bhagwan Lal had pretended to mortgage,—at the same time guardedly refrained from saying whether or not he could do so without discharging the burden which Bhagwan Lal had affected to place upon it, on the ground that the facts were not sufficiently stated to enable it to do so. We are, therefore, in no degree fettered by that decision in regard to the mode in which we ought to answer this question, and we are, therefore, free to determine the conditions upon which, in the present case, the property ought to be recovered by the family, by a consideration of the apparent equities between the parties.

The first thing bearing on this point, which is important to be kept in mind is, that, although as long as no partition of the property has been come to, the whole family alone is capable of burdening the property, or of aliening the entirety or any portion of it, yet a partition of the property among the members, amounting either to an ascertainment merely of the shares in which it is thereafter to be held, or to an actual division by metes and bounds, may be come to by the family at any time; and moreover, every member of the family may, whenever he chooses, require that it shall be come to. It appears then to be clear, if we return to the facts of the case which is before us, that the father, defendant (second party), might, if he were so minded, even in this very trial, say, 'I claim that the property on its coming back to the family shall thenceforward be enjoyed by the members in shares, and I ask that the amount of my share should be determined, as between the members, in order that I may, now at any rate, though I could not before do so effectually, hypothecate that share to the defendants (first party) as security for the money which I have taken from them.' There is no doubt that he could do this the very moment when the property should come back after decree, and therefore nothing but considerations of expediency can intervene to prevent his doing so at

the hearing of the case itself. And plainly the defendants (first party) are in equity entitled, as against the father, to insist upon his calling his share into being, and realizing it for their benefit. He obtained their money by representing that he had a power to charge the joint family property, which he knew at the time he did not possess; he is therefore at least bound to make good to them that representation, so far as he can, by the exercise of such proprietary right over the same property as he individually possesses. Substantially the same reasoning applies to the case of the eldest son, Mahabeer Persad, who aided his father in effecting the mortgage.

On the whole, then, we are of opinion that a decree ought to be given to the plaintiffs to the effect that the property be recovered by the plaintiffs for the joint family, but that this decree must be accompanied by a declaration that, on recovery, the property be held and enjoyed by the family in defined shares, namely, one-third belonging to the father, defendant (second party), and one-third belonging to the eldest son, Mahabeer Persad, and one-third belonging to the second son, Sheonund Persad, a minor; and that it be also declared that the shares of the father and of the eldest son be jointly and severally subject to the lien thereon of the defendant (first party), for the repayment of the sum of Rs. 3,000, advanced by the defendant (first party) to the defendant (second party), and interest thereon at 6 per cent. from the date of the loan until repayment.

If there are not materials on the record in the present state of the case for determining these shares, the case must be remanded to the lower Court for the inquiry what are the respective shares into which the father, defendant (second party) and his sons are entitled to have the property divided.

We assume that the father and the two sons are all the independent members of the joint family, because the plaintiffs were bound to make them all parties to the suit. If, however, there are others who are interested in the partition, their names must be put on the record as parties defendant before the extent of the father's and of Mahabeer Persad's shares are determined.

After the delivery of the above judgment, the plaintiffs, appellants, informed the Court that their mother was alive, and

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that any interest she might have in the property, in the event of a partition, should be taken into consideration. In consequence of this, the case came on for further argument as to what interest (if any) she had in the property.

Baboo *Kaliprosono Dutt*, for the appellants, contended that the mother was entitled to a share on partition—*Vivada Chintamani*, p. 230; *Mitakshara*, ch. i, s. 2, v. 9. She is entitled to a share equal to that of sons—*Mitakshara*, ch. i, s. 7, vv. 1, 2; ch. ii, s. 1, vv. 31, 32; *Dayavibhaga* (*Parasara Smriti*), v. 6 1 *Macnaghten's Hindu Law*, p. 48.

Baboo *Anodapersaud Banerjee*, for the respondents, contended that the property in dispute was the ancestral property of the plaintiffs, and they had therefore an equal right with the father. On partition of ancestral property, the mother is not entitled to a share. Vv. 6, 9, & 10, s. 2, ch. i of the *Mitakshara* refer to partition of self-acquired, and not of ancestral property. It is from the nature of the right which a son acquires by birth in the ancestral property, that he can compel his father to make a partition of that property. The *Mitakshara*, ch. i, s. 5, treats of partition of ancestral property but does not recognize the mother's right to a share. The passage in 1 *Macnaghten*, p. 48, discusses the point whether a childless woman can get a share, or one who has children. It has no reference to the present question.

Baboo *Kaliprosono Dutt*, in reply, contended that there was no authority for saying that the *Mitakshara*, ch. i, s. 2, vv. 6 & 9, treats only of self-acquired property. In the original *Mitakshara*, there is no division into chapters and sections. The way in which ch. i, s. 2, and ch. i, s. 5, have been arranged in the translation is without authority. Hence, there is no reason for saying that the cases in which the mother is entitled to a share are restricted to self-acquired property only.

The Court delivered the following judgments:—

PHEAR, J.—After the consideration which I have been able to give to the authorities which were cited on both sides during the second argument in this case, I have arrived at the opinion

that the widow is, upon the division which has been directed to be made, entitled to her share, either by way of maintenance, or as a portion of the inheritance; it is not for us at present to determine which. It seems to me that s. 2, ch. i of the Mitakshara was intended to convey the direction which should govern the partition of the property by the father in his lifetime, to the effect that to the sons he may, if he choose, give unequal shares in his self-acquired property, but he must give them equal shares in his ancestral property. And as to his wives, he must in both sorts of property give them equal shares, unless any one of them has previously had separate property given to her; in which event she will take a half share only. In both cases alike, it appears to me to be implied, if not expressed, that the wives are necessarily sharers. It would be strange if they were not entitled to a share in ancestral property; because if we look to the analogy of the Bengal law, we find there that, upon a division of the property amongst the sons, after the death of the father, while the mother is alive, the mother is certainly entitled to a share, and the Bengal law, we know, is not in so developed a state as the Mitakshara law in regard to the interests of the dependent members of the joint family: it rather tends to cut them down. I think, in this instance, I am fortified by the example of the Bengal law in the view which I have taken, that the wives are entitled, under the circumstances of the case, to a share in the ancestral property.

The defendant says that there is one wife alive. The result will be, we must say, that the father and the elder son's share is one moiety, and the mother and the other son's share is another moiety, of the ancestral property.

If there is self-acquired property forming a part of the property which was the subject of alienation, then that will remain the undivided separate property of the father subject to his alienation. There was an issue raised upon this point in the Court below, but it was not tried. And, consequently, unless the parties come to some agreement upon it, the case must go back for the trial of that issue to the lower Court, and the evidence which may be adduced thereon must be brought up with the record to this Court.

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AINSLIE, J.—I have not had an opportunity of considering this point quite so fully as I should have wished to have done. I am not prepared to dissent from the judgment which has been given by my learned brother.

Appeal allowed.

Before Mr. Justice Phear and Mr. Justice Ainslie.

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June 14.

JUGDEEP NARAIN SINGH (PLAINTIFF) v. DEENDIAL AND ANOTHER
(DEFENDANTS).*

Hindu Law—Mitakshara—Ancestral Property—Alienation by Father.

T S, a Hindu, who with his son *J N* formed a joint Hindu family subject to the Mitakshara law, executed in favor of *D* a bond, whereby he professed to pledge a share of certain family property as security for the repayment of money advanced to him by *D*. Default being made in payment of the loan when due, *D* brought a suit on the bond against *T S*, and obtained a decree for the amount secured thereby, in execution of which decree he attached and caused to be sold the right, title, and interest of *T S* in certain other family property, not covered by the bond, and himself became the purchaser thereof, and took exclusive possession of the property. In a suit brought by *J N* against *T S* and *D* to recover possession of the property purchased by *D*, on the ground that no legal necessity existed for the loan: *Held* that *T S* had no individual right to any portion of the property which he could pass to a third person, and therefore *J N* was entitled to have the alienation set aside, and to recover possession of the property. There being nothing amounting to any voluntary representation by *T S* of his having any right or interest in the property, or any representation of fact made by *T S* in order to induce *D* to advance the money, and nothing to show that there was no other property out of which the decree could be satisfied, no equity arose between *T S* and *D* such as entitled the latter to call on *T S* to divide the property with his son, so as to make the share of *T S* available by *D* to the extent of the loan.

Mahabeer Persad v. Ramyad Singh (1) distinguished.

By a bond dated the 28th January 1863, one Toofanee Singh, a Hindu, who, with his only son, the present plain-

* Special Appeal, No. 1266 of 1872, from a decree of the Judge of Gya, dated the 28th March 1872, modifying a decree of the Subordinate Judge of that district, dated the 21st August 1871.

(1) *Ante*, p. 90.

tiff, formed a joint-Hindu family under the Mitakshara law, proposed to pledge to the defendant Deendial a five annas share of certain family property as security for the repayment of a loan from Deendial. The money not being repaid when due, Deendial sued Toofanee upon the bond and obtained a decree for the amount secured thereby. In execution of this decree, Deendial attached and sold Toofanee's right, title, and interest in certain other family property not covered by the bond, and himself became the purchaser thereof; and under color of his purchase took exclusive possession of the property.

The plaintiff Jugdeep Narain now sued to recover possession of the whole of the property purchased by the defendant Deendial at the execution-sale, on the ground that the debt to the latter was incurred without legal necessity, and that nothing passed under the sale beyond Toofanee's undivided right, title, and interest in the property sold. The defence raised was that the debt was contracted under pressure of legal necessity, and with the plaintiff's knowledge and concurrence.

The Subordinate Judge, being of opinion that the loan was justified by necessity, but that only Toofanee's right, title, and interest passed under the sale, gave the plaintiff a decree for a moiety of the property.

On appeal by both parties the Judge found that the existence of legal necessity for the loan was established. Under these circumstances he held that the whole of the property, and not merely Toofanee's interest therein, was liable to be sold, and, further, that the plaintiff could not sue to recover possession in his father's lifetime. He accordingly dismissed the suit.

The plaintiff appealed to the High Court.

Messrs. *Twidale* and *C. Gregory* for the appellant.

Baboo *Chunder Madhub Ghose*, *Romes Chunder Mitter*, and *Nilmadhub Sen* for the respondents.

Mr. *Gregory*, for the appellant, contended that there was no legal necessity to justify the loan. According to the Mitakshara law, the father and son have an equal right in ancestral property, and the father, while living in commensality with

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his son, has no distinct share therein. The sale being of the right, title, and interest of Toofanee, could not pass the right of the plaintiff.

Baboo *Chunder Madhub Ghose*, for the respondent, contended that, since the lower Courts had found as a fact that there was legal necessity for the loan, the whole property, and not merely the father's interest therein, passed under the sale. The case was analogous to that of the sale of the right, title, and interest of a Hindu widow for the debt of her husband, in which case the whole property, and not the life-estate of the widow; only is transferred by the sale—*Ishan Chunder Mitter v. Buksh Ali Soudagar* (1), *Tarakant Bhattacharjee v. Mussamut Luckhee Dabea* (2), and *The Court of Wards v. Maharaja Coomar Ramput Singh* (3). The purchaser was at least entitled to the share of the father: he could compel the father to come to a partition with his son, and upon such partition retain possession of the father's share—*Mahabeer Persad v. Ramyad Singh* (4).

Mr. *Gregory* was not called upon to reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the facts, continued).—In many respects the facts of this suit run parallel to the facts of a suit, *Mahabeer Persad v. Ramyad Singh* (4), which we lately had before us. No doubt the execution-sale was had under the conduct of the judgment-creditor; but the proceedings seem to be regular, and the sale must effectually be treated as a sale by the father of his right, title, and interest. The judgment-creditor himself cannot, we think, claim to have his sale treated as anything more extensive than this. He had the conduct of the sale, and he seized the property and sold it, in his own discretion, for the purpose of causing the money-decree to be satisfied. The property was not sold in pursuance of a decree directing that it should be sold, or in any manner pointing out that it was the property out of which the debt should be realized.

(1) Marsh., 614.

(2) 2 Hay's Rep., 8.

(3) 10 B. L. R., 294.

(4) *Ante*, p. 90.

And in this respect, the present case seems to me to differ entirely from the two leading cases which have been referred to, the one of *Ishan Chunder Mitter v. Buksh Ali Soudagar* (1), and the other of *The Court of Wards v. Maharaja Coomar Ramaput Sing* (2). The judgment-creditor chose, for reasons of his own, simply to sell the right, title, and interest of the father; and he cannot now, I think, be heard to assert that he is entitled to hold the whole property, as if he had in fact sold the whole family property, and was, at the time of the execution-sale, entitled so to do. The case then stands thus,—as the result of that execution-sale of the right, title, and interest of the father, the head of a joint family, the members of which were living together under the Mitakshara law, the father's right, title, and interest in the family property, which is the subject of suit, has been in words sold to the first defendant.

But it is further clear, on the facts of this case, that, at the time of the execution-sale, the father had no separate rights and interests in the property apart from his son. There had been no division of interests partially or completely. The property was, as I understand, enjoyed jointly by the father and the son as a joint Hindu family under the Mitakshara law, and in this situation no individual has a distinct legal right to any portion or share of the property, such as he can pass to any third person.

At first we were of opinion that these facts would bear the application of the principle which was applied to the case of *Mahabeer Persad v. Ramyad Singh* (3). If the father had in fact, by the sale, professed to pass his rights and interests in the property to the judgment-creditor, and so held out that he had power to pass something, and if the judgment-creditor had paid money value for these rights and interests upon the faith of this profession, then, probably, we ought in this suit to take care that a partition of the property should be come to between the father and son—at least to the extent of an assignment of an undivided share to each respectively—before the property should be delivered back; because although, no doubt, under these facts the purchaser obtained no legal right to the estate or to any

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(1) Marsh., 614.

(2) 10 B. L. R., 294.

(3) *Ante*, p. 90;

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portion of it, so that, consequently, any member of the joint family had a right to bring a suit for the purpose of recovering it back from him, yet it would obviously be inequitable that the father should in this oblique way be able to return to the full enjoyment and benefit of the family estate (as he undoubtedly would, if any member of the family recovered it from the purchaser) without making good to the purchaser the consideration-money which he had paid for it; and that would have been in substance the present case, if the judgment-creditor had got a decree for the sale of the property pledged by the father's bond, and had pursued that decree by proceedings for sale, and had eventually bought the property under it. The sale, in that course of events, would have been a sale which the father had brought about by pledging the property sold for the consideration of the money advanced to him. It would have been manifestly inequitable, supposing those had been the facts of this case, that the father, notwithstanding his acts, should recover back the property entirely free and unincumbered, released even from the burden which he had affected to put upon it.

But these are not the facts of the present case. The judgment-creditor here only obtained a money-decree on the bond against the father, and was only entitled, by reason of his having got that decree, to seek satisfaction of it against the property of the father. He has seized and sold property, which is not the property of the father, and in which the father does not possess any assignable interest. The sale which has taken place as a consequence of this course of action, although it is a sale, no doubt, by the father of his rights and interests, so far as he had any rights and interests at the time, still does not amount to any voluntary representation made by the father of his having any rights and interests in the property; still less, if I may say so, was it ever a representation of fact made by the father for the purpose of inducing the defendant to advance money to him: the money had been advanced long before. It seems to me, therefore, that there is nothing in the conduct of the father in relation to the sale of this property to the defendant, which gives rise to any equity between him and the defendant, such as entitles the latter to call upon the father to divide the property.

with his sons, and so make the property available for being appropriated and retained by the creditor to the extent of the father's potential rights. I think then, on the whole, that the ground upon which we decided the former case, and were there led to impose a condition upon the recovery of the joint family property by the plaintiff, does not here exist.

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But there might have been another ground upon which the defendant could insist, as against the father and the son, that this joint property should be divided; and perhaps it is as well to refer to it here in order to show that it is not involved in the facts before us. Under the money-decree against the father, the first defendant is entitled, in order to obtain satisfaction of that decree, to seize any property of the father which he can find, and to sell it, whether it be in the condition of joint or several property. But he is not, I think, simply upon that footing, entitled to put his hand upon the joint property of the family governed by Mitakshara law, of which the father is the head, for the purpose of altering its condition by division and sale. Still I also think that if he could, in a regular suit brought for the purpose, show to the Court that there was no property belonging to the father which he could find or reach, other than the property in which the father was interested jointly with his son as a joint Mitakshara family, he would have a right to stand so far in the shoes of the father as to be able to insist upon such a partition of the property as might enable him, so to speak, to procure something wherewith afterwards to satisfy his own decree in due course of execution proceedings. And similarly, even in the present case assuming that he, in the first instance, *bonâ fide* seized this joint family property under the belief that it belonged to the father, and sold it in order to satisfy his decree, probably he might successfully resist the claim of the sons to get it back in its integrity, if he could show that there was no other property belonging to the father to which he could have recourse, and that he consequently had, as I have endeavoured to explain, a right founded in equity at least to have this property divided, and so made available for being seized and sold. But no facts of this kind have been proved in this case: they have not even been set up, and for a very good reason. As

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long as the property which was pledged by the bond remains untouched, it would be difficult for the judgment-creditor to say that there was not other property of the father besides this, which is the subject of suit, to which he could have recourse. Inasmuch as the father pledged that property as against him, it must be taken that he had a right to pledge it; and until that right is questioned by the sons, it cannot be assumed that the judgment-creditor would not be able to realize his debt out of that property if he proceeded against it. It thus appears to me that on the second ground also, which I have mentioned as a possible ground for resisting the plaintiff's claim to recover the property in its entirety, the defendant has failed in this suit. The result is that, I think, the plaintiff has made out his right to recover this property for the benefit of the joint family.

It was suggested to us just now that a portion of the property was the separate property of the father himself, acquired by him out of his own funds, and it seems that the first Court adopted this view of the facts. The lower Appellate Court, however, has come to no finding on the point; and if there was any evidence on the record tending to show that this property was the father's separate property, we ought to send the case back to the lower Appellate Court for trial of this issue. We find on enquiry, however, that there is no such evidence. It would be, therefore, useless to send the case back for this purpose.

We reverse the decision of the lower Appellate Court, and decree that the plaintiff do recover the property, which is the subject of suit, for the benefit of the joint family.

The plaintiff must have his costs in all the Courts.

Appeal allowed.

PRIVY COUNCIL

GOLAM ALI (DEFENDANT) v. KALLYKISHEN THAKOOR AND ANOTHER, EXECUTOR AND EXECUTRIX OF THE LATE BABOO GOPAUL LOLL THAKOOR (PLAINTIFF).

P. C.*
1872
June 20.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Special Appeal—Appeal to Privy Council—Practice.

Where a case has been heard by the High Court on special appeal, and on appeal to the Privy Council it is desired to include in the appeal the decisions of the lower Courts on the facts, an application for special leave to do so, should be made previous to the hearing. The Judicial Committee will not, as a rule, allow a petition of appeal from those decisions to be put in at the hearing, *nunc pro tunc*.

THIS was an appeal from a judgment and decree of the High Court (Bayley and Macpherson, JJ.), dated 5th August 1868, dismissing a special appeal against a judgment of the Judge of Backergunge, dated the 31st July 1867, made on regular appeal from a judgment of the Deputy Collector of the said zilla, dated the 19th July 1867, which it affirmed. All these three decrees were made in favor of the plaintiff in the suit, now represented by the respondents; and the two first judgments, in order of date, were concurrent judgments on the facts and evidence.

A special appeal from the Judge's decision preferred by the defendant to the High Court, was dismissed with costs.

The defendant thereupon, who (the plaintiff having died) had revived the suit against his representatives, obtained leave to appeal to Her Majesty in Council against the decision of the High Court on special appeal. Leave was granted, and the appeal now came on for hearing.

Mr. *Doyne* for the appellant proceeded to argue that the Court of first instance and the Judge on appeal had come to an erroneous conclusion upon the facts.

**Present*:—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR LAWRENCE PEARL.

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Mr. *Leith* (Sir *R. Palmer*, Q.C., with him) objected that there was no appeal save against the judgment of the High Court, which could not enter into the facts.

Mr. *Doyme* submitted that the practice was to allow the whole interlocutory orders to be opened on appeal; but if this were not so, that the Board, as a matter of course, would allow a petition of appeal to be put in *nunc pro tunc*.

Their LORDSHIPS delivered the following judgment:—

Their Lordships have considered Mr. *Doyme's* application, and the conclusion they have come to is this that, for the reasons which I am about to state, they would not be justified in the present case in giving special leave to include in this appeal an appeal against the decisions of the two Judges who have dealt with the questions of fact in the cause,—the Deputy Collector, and the Judge to whom there was an immediate appeal from him.

They have looked at the petition of appeal to Her Majesty, and, it is perfectly clear, that appeal is preferred simply against the order of the High Court on the special appeal. It is undoubtedly true that it has, recently at least, been the practice to allow the whole case to be opened upon questions of fact, as well as questions of law, although the High Court, the appeal to it having been merely a special appeal, has been able to deal only with the latter. The mode of accomplishing this, if the party thinks it necessary for the justice of his case, is to apply to their Lordships in due time for special leave to appeal against the decisions of the subordinate Courts; an application to be granted, not as of course, but on sufficient grounds. No such application has been made in the present case; but it is stated by Mr. *Doyme* that the Board has been in the habit of granting this privilege at the hearing *nunc pro tunc*, if they thought the justice of the case required it. We are not aware of, nor is Mr. *Doyme* able to refer us to, any case in which this was done, nor does our recollection supply one; although, if their Lordships saw clearly that the justice of the case could not be reached without allowing such an application, they do not say that they would not

grant it under any circumstances, or upon any terms. They are of opinion that nothing but very special circumstances ought to justify the granting of leave to appeal against the other decrees at so late a period as the hearing of the appeal; and that no such circumstances exist in the present case. The question is one of those which it is extremely difficult for a tribunal like this to deal with,—the simple question of parcel or not parcel, whether a certain portion of chur land is included in a particular tenure, or remained liable to assessment for rent. It is emphatically one of those questions which are best decided, and can only be satisfactorily decided, upon the spot; and in re-opening the decisions on the facts in the present case, we should be running counter to that general rule which governs the proceedings of their Lordships, namely, that where there have been two concurrent findings upon questions of fact, this tribunal will not, except upon very special grounds, disturb them. Therefore, their Lordships think they would not be justified in granting this application. Of course, they are ready to hear whatever may be argued further upon the question whether the decision of the High Court upon the special appeal was correct or not, and if it were not correct, what order that Court ought to have made on the grounds before it (1.)

This case was then argued on the merits, and their Lordships dismissed the appeal with costs.

Appeal dismissed.

Agent for appellant: Mr. *Wilson*.

Agents for respondent: Messrs. *Watkins and Lattey*.

(1) This ruling was followed in the which was decided by the Judicial case of *Raja Nilmoney Singh Deo v. Committee* on 18th July 1872. *Beer Singh and The Government*,

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KALLYKISHEN
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ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

1873
Dec 16.

RAMNATH DUTT v. MATUNGINEE DOSSEE.

Attorney's Lien for Costs—Compromise by Parties—Collusion.

Where the parties to a suit came to a compromise between themselves without the knowledge of the plaintiff's attorney, when the suit was at such a stage that it did not appear that the plaintiff was entitled to recover anything, and there was no proof that he was to receive anything from the defendant on the compromise, or that the compromise was not a *bonâ fide* one, *Held*, the plaintiff's attorney was not entitled to have the compromise set aside on the ground that he might thereby be deprived of his costs.

A clear case of fraud and collusion must be made out to entitle the attorney to the interference of the Court.

THIS was an application by the defendant on notice for an order that the suit should be dismissed on the terms of each party paying their own costs of the suit when taxed on scale 2. From the affidavits in support of the application, it appeared that the suit was instituted to obtain a declaration of the plaintiff's right to a share in, and for an account of, a certain partnership business. After the institution of the suit, the plaintiff came to an amicable settlement with the defendant, in terms of which the plaintiff requested the defendant to instruct her attorney to prepare a petition for dismissal of the suit, on the terms that the plaintiff gave up all claim against the defendant; that the defendant should be at liberty to take back from the Registrar certain Government paper deposited with him as security by the defendant; and that each party should pay their own costs of the suit. The agreement to settle the case was come to at the office of the defendant's attorney; and on the petition being drawn up, and sent to the plaintiff's attorney for approval on behalf of the plaintiff, the petition was returned by the attorney, who said he had not heard anything from his client of the proposed settlement. The plaintiff thereupon, on being communicated with on behalf of the defendant,

agreed to instruct his attorney to consent to the application for the dismissal of the suit, and a letter was accordingly written in the office of the defendant's attorney, and sent by him to the plaintiff's attorney, instructing him to consent, and the petition was again sent to him for approval. He alleged that the parties were in collusion to deprive him of his costs, and he agreed to consent, provided his costs of suit were paid to him in the first instance, or a personal undertaking given by the defendant's attorney that they should be paid. This was not agreed to, and the application was now opposed by the attorney for the plaintiff, on the ground that the suit had been compromised behind his back, and that he was consequently likely to be deprived of his costs, if the application were granted, and the security deposited by the defendant were allowed to be taken out of Court.

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Mr. *Branson* in support of the application.

Mr. *Wood*, contra, submitted that the Court would not allow such an arrangement as this, by which the attorney would be deprived of his costs; that an attorney had a lien on the fund in Court which would not be lost by a voluntary, and apparently collusive, agreement to compromise come to behind his back by the parties to the suit—*Smith's Ch. Pr.*, 168; *Beames on Costs*, 312; *Anonymous* case (1). Where there is collusion the Court will protect the attorney—*Wright v. Burroughes* (2); *Pulling on Attorneys*, 383; *Daniell's Ch. Pr.*, 1721.

Mr. *Branson* in reply.—The parties themselves are perfectly *domini litis*, and able to come to any compromise they think fit, even though the effect may be to deprive the attorney of his costs—*Brunsdon v. Allard* (3) and *Ex parte Hart* (4). Even if there is collusion, it is doubtful whether the Court will interfere—*per* Crompton, J., in *Brunsdon v. Allard* (3). At any rate a clear case of collusion must be made out.

Mr. *Wood* referred to *Fairland v. Enever* (5).

MACPHERSON, J.—The application must be granted. It is opposed by the plaintiff's attorney, who says that the suit has

(1) 2 Ves. Sen., 25.

(2) 3 C. B., 344.

(3) 28 L. J., Q. B., 306.

(4) 1 Dowl., 324; S. C., 1 B. & Ad., 660.

(5) 1 Dick., 114.

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been compromised behind his back, and that, in making the compromise, the parties are colluding to deprive him of the means of receiving the costs due to him from the plaintiff. Now, as the matter at present stands before me, it does not appear that the plaintiff ever was entitled to recover anything from the defendant,—or that he has received or is to receive anything in consideration of the withdrawal of the suit on the terms proposed. It may be that the Court would, under certain circumstances, be bound to interfere on behalf of the plaintiff's attorney, and to see that his costs were paid out of a fund in Court, which had been decided to belong to the plaintiff. But there is nothing to show that the plaintiff is, or would ever be, entitled to receive anything out of the securities now in Court, which were ordered to be brought in merely to protect such rights as the plaintiff might eventually be decreed to have in them. There has never been any declaration by the Court that the plaintiff had in truth any right to the money. The plaintiff himself now says, that having, since the institution of the suit, gone through the accounts, he finds that he ~~made a mistake~~, and that he is not entitled to any portion of what he supposed he was entitled to, and claimed in his plaint. It is said this statement is false, and that there must be some private arrangement between the parties. That may be so; but there is no evidence to show that it is; and I cannot assume that it is so. The position of the plaintiff's attorney is wholly different from what it would have been, had judgment been recovered against the defendant, or if he could have proved that any sum was payable under the compromise to the plaintiff. Even if a decree had been actually obtained for a specific sum of money, the plaintiff's attorney, before the compromise could be set aside by the Court, must have made out a clear case of fraud and collusion; see *Brunsdon v. Allard* (1). The last case on the subject is that of *Ex parte Morrison* (2), in which the judgment of Blackburn, J., is very applicable. That case, like the one now before me, is a case in which the plaintiff compromised matters privately before the litigation had gone far enough to show

(1) 28 L. J., Q. B., 306.

(2) 4 L. R., Q. B., 153.

whether it would end in the plaintiff's favor or not. These cases show that, without distinct fraud and collusion being made out, the Court will not interfere in any case, and especially not in a case in which it has not been ascertained whether anything is due to, or has been recovered by the plaintiff. Mr. Branson is therefore entitled to the order he asks for, but his client must bear his own costs. I think the plaintiff's attorney has great reason to complain of the way he has been treated, and that the conduct of Mr. Pittar, who, being the defendant's attorney, held communication with the plaintiff direct, instead of through his attorney, and got the matter settled in his office behind the back of the plaintiff's attorney, was extremely wrong and unprofessional. Therefore, the defendant must have his own costs of this application.

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Application granted.

Attorney for the plaintiff: Baboo Bolye Chund Dutt.

Attorney for the defendant: Mr. Pittar.

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

NANHOON SINGH (DEFENDANT) v. TOFANEE SINGH (PLAINTIFF).*

1873
May 6.

Court Fees Act (VII of 1870), ss. 6 & 12—Valuation of Suit—Jurisdiction.

For the purpose of determining the question of jurisdiction, the valuation of a suit should be computed according to the market-value of the subject-matter of the suit, and not by the special rules applicable to valuation laid down in Act VII of 1870.

THIS was a suit for pre-emption, valued at Rs. 200, brought by the plaintiff in the Court of the Munsif of Patna.

The defendant set up (*inter alia*) in his written statement that the suit was undervalued, and that the value of the property,

* Special Appeal, No. 843. of 1873, from the decree of the Officiating Judge of Patna, dated the 12th March 1872, affirming a decree of the Munsif of that district, dated the 21st June 1872.

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being in excess of Rs. 1,000,—viz., Rs. 2,000,—the Munsif had no jurisdiction to try the case.

The Munsif passed a decree in favor of the plaintiff.

On appeal the Officiating Judge confirmed the decree of the lower Court. He said in his judgment:—"The first objection raised was a question of jurisdiction. As regards jurisdiction, it is urged that the plaintiff has undervalued his suit. Now it is true that the value of this suit is still placed at Rs. 200, the very amount which was declared to be an improper valuation at the time when the former suit was brought, but then the present suit was not instituted until after Act VII of 1870 came into force, and, under cl. 6 of s. 7 of that Act, in suits to enforce a right of pre-emption, the value is computed in accordance with cl. 5 of that section, and in cl. 5 the value is declared to be ten times the revenue. Hence the present suit has been properly valued."

The defendant appealed to the High Court.

Messrs. *Twidale* and *C. Gregory* for the appellant.

Baboo *Mohesh Chunder Chowdhry* for the respondent.

The judgment of the Court was delivered by

PHEAR, J.—This was a suit brought to enforce a right of pre-emption, and the property which had been sold was sold for Rs. 2,000, a consideration which may, under the circumstances of the case, for the moment be taken to represent the market-value of the property. This suit however is valued only at Rs. 200. The lower Appellate Court says:—(*His Lordship read the portion of the judgment set out above, and continued*).—Thus it appears that the lower Appellate Court has overruled the objection as to the valuation of the suit, upon the ground that the method of valuing pursued has been that which is directed by the rules of the Court Fees Act of 1870.

On special appeal it is urged that this ruling is wrong, and that, for the purpose of jurisdiction in the Munsif's Court, the valuation ought to have been made according to the market-value of the property, and not according to the special rules prescribed in the Court Fees Act.

We are of opinion that this objection is a good ground to support the special appeal. It appears to us that the decision of the Division Bench in the case of *Jeebraj Singh v. Inderjeet Mahtoon* (1) does in fact conclude the matter; and that, unless

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(1) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

The 28rd May 1872.

JEEBRAJ SINGH (DEFENDANT) v. Inderjeet Mahtoon (PLAINTIFF).*

Court Fees Act (VII of 1870), ss. 6 & 12—Valuation of Suit—Jurisdiction.

Mr. Twidale for the appellant.

Mr. C. Gregory for the respondent.

THE judgment of the Court was delivered by

COUCH, C.J. — The Subordinate Judge has held that the decision of the Munsif upon the question as to what was the value of the subject-matter in dispute, with reference to the jurisdiction of the Court, is final under s. 12 of the Court Fees Act. Now, it is admitted by Mr. Gregory that that is not so; and that would at once dispose of this special appeal; because it shows that his decision is erroneous, and it would be necessary that the case should go down to him again. But upon the other question, namely, whether the value for the purpose of jurisdiction is to be computed according to the Court Fees Act, I think there is nothing to show that it was the intention of the Legislature that that mode of computing the value was to be

applicable to the question of the jurisdiction of the Court, and was to be used in ascertaining what was the value of the subject-matter in dispute.

Act VII of 1870 is an Act for making the Court fees payable; and after providing in s. 6 that the fees should be paid, there follow a series of provisions with regard to the way in which the Court fees shall be estimated. In suits for lands, houses, and gardens, it is according to the value of the subject-matter, and such value shall be deemed to be as provided by the Act. I think that this must mean that the value is to be deemed to be such for the purposes of the Court fees only, and not for other purposes. And s. 12 appears to support this view, because it treats this as being a question relating to valuation for the purpose of determining the amount of any fee, and it makes the decision upon this question final. I can see nothing in this Act which would lead me to suppose that the Legislative Council intended that these rules should be applied to the determining what was the value for the purpose of jurisdiction.

Therefore the decree of the lower Appellate Court must be reversed, and the case must be remanded for the Appellate Court to determine what is the value of the subject-matter in dispute. The appellant must have the costs of this appeal.

* Special Appeal, No. 1027 of 1871, against the decree of the Officiating Subordinate Judge of Zilla Patna, dated the 25th of April 1871, reversing the decree of the Sudder Munsif of Patna, dated the 9th January 1871.

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we are prepared to differ from that decision, we must give effect to the objection which has been made on special appeal.

The present Chief Justice in that case delivered the opinion of the Bench, and, as the judgment is not a long one, I will read it in full:—(*after reading the judgment of His Lordship, proceeded*).—And this decision of the Division Bench was in truth almost the necessary consequence of the principle laid down by a Full Bench of the High Court in the case of *The Collector of Sylhet v. Kali Kumar Dutt* (1). The late Officiating Chief Justice, Mr. Norman, on that occasion, stated the opinion of the Full Bench in these words:—"We are of opinion that, whenever a plaint is rejected, under the provisions of s. 30 of Act VIII of 1859, on the ground that the amount or estimated value of the claim, as stated by the plaintiff, is beyond the jurisdiction of the Court, an appeal is given, by s. 36, from the order rejecting the plaint. We think it clear that the provisions in the note to the Stamp Act, XXVI of 1867, which was passed for a totally different purpose,—namely, to prevent appeals upon questions of stamp-duty, where the sole question is as to the amount of stamp to be impressed on the plaint,—cannot have the effect of repealing, by implication, the provisions of the Code of Civil Procedure, which in clear and distinct terms give a right of appeal where a plaint is rejected upon the ground that it is undervalued. We think it clear that whenever, for the purpose of determining the question whether or not the lower Court was right in rejecting the plaint upon the ground that it had no jurisdiction to entertain the suit, it becomes necessary to try what is really and truly the value of the property in suit, the Court, which has to determine the appeal upon the question of jurisdiction, has, incidentally, power to determine all those questions of fact, which are necessary to enable it to arrive at a satisfactory determination on the question of jurisdiction. We think, therefore, that there is no doubt that an appeal to the Subordinate Judge lay in the present case, and for the purpose of determining that appeal, the Subordinate Judge had

(1) 7 B. L. R., 663.

the power to enquire into and determine the question of the value of the property in suit."

The decision of the Full Bench in that case, by which it was held that the question as to the value of the property, for the purpose of jurisdiction, was a question of fact open to appeal, while the question as to the value of the property, for the purposes of stamp-duty, was not open to appeal, but was a question to be finally decided by the Munsif, under the terms of the Stamp Act in force, really seems to have had the effect of ruling that these two matters were essentially distinct—that valuation of the subject of suit for the purposes of the Stamp Act had been made by the Legislature a matter separate and different from the valuation for the purposes of jurisdiction; because, it is at once obvious that if the question relative to the one is open to appeal, while the question relative to the other is not open to appeal, it might well enough happen, and would frequently happen, that in one and the same suit, before the suit came to a final determination, the values of the subject of suit arrived at by the two processes of valuation would be very different in amount. As the effect of these two decisions, it appears to me to have been made clear that the valuation which is to govern the jurisdiction of the Court, is a perfectly distinct matter, as I have already said, from the valuation according to which stamps and fees are to be levied.

The present Act, which limits the jurisdiction of the Munsif according to the valuation or amount of the suit, is the Act VI of 1871, the 20th section of which runs in these words:—"The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000."

There is no provision in any part of the Act itself which goes to direct the mode in which the amount or value of the subject-matter in dispute is to be calculated. Precisely the same words were used in Act XVI of 1868, which preceded the present Act VI of 1871. Section 13 of Act XVI of 1868 says:—"Munsifs are empowered to try all original suits cognizable by the Civil Courts of which the subject-matter does not exceed in amount or value Rs. 1,000."

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The words used in both these Acts are "amount or value:" and we have nothing whatever, in either of these Acts, to indicate that the Legislature intended the amount or value, for the purposes of the Munsif's jurisdiction, to be assessed or estimated in any established or special manner. The result then, as it seems to me, is inevitable. The two decisions to which I have already alluded having put it beyond doubt that the special rules of the present Court Fees Act, and of the old Stamp Act, were not intended by the Legislature for this purpose, it is inevitable that the Courts must, in each case, estimate the amount or value of the subject-matter in dispute, for the purposes of jurisdiction, by the aid of the best evidence available, bearing upon the actual amount or value of that subject.

It appears to me further that this view of the case could be fortified by a consideration and discussion of the history, so to speak, of the Munsif's jurisdiction, from the time of its first creation, if it were necessary that I should go into any detail on this subject. But I think it sufficient for my present purpose merely to point out that the first of the two modern Acts, to which I have just now referred as dealing with the jurisdiction of the Munsifs,—namely, Act XVI of 1868,—while it repeals Regulation V of 1831 by the appended schedule, makes a special reference to it as a Regulation extending the powers of the Munsifs, Sudder Ameens, and so on. It is thus clear, if evidence to this effect were wanted, that the Legislature, at the time of the passing of Act XVI of 1868, had expressly under its notice the several provisions of Regulation V of 1831, and in actual view of them, so to speak, used the words for defining the Munsifs jurisdiction which I have already read out. But Regulation V of 1831 limited the jurisdiction of the Munsif in a very special and express manner; while it raised the then existing jurisdiction of the Munsif to the amount of Rs. 300, and also gave, I think for the first time (though about that I am not quite sure), powers to the Munsif to entertain suits for immoveable property, it expressly enacted that the rules prescribed in existing Regulations with regard to the mode of computing the value of the property in litigation should be applicable for the purposes of computing the property in the

case of Munsifs's jurisdiction. Then again, while that same Act created Principal Sudder Ameens, and authorized the District Courts to refer to them original suits under Rs. 5,000, it directed that the value for this purpose should be calculated according to Schedule B of Regulation X of 1829, which was the Stamp Act then in force. And so also it directs that the amount which was to govern the jurisdiction of the Sudder Ameens, should be calculated by the rules in the same Schedule. It seems to me exceedingly important in judging of the question which is before us, that we find the Legislature, when it used the words "amount or value" in Act XVI of 1868 without further limitation or specification at all, had before it, and under its notice, the provisions of the Act which, up to that time, regulated the jurisdiction of the Munsif by express reference to the rules of the Stamp Act. We must take it, I think, that if the Legislature, in framing the new Act, which was to replace the old Regulation in regard to the Munsifs's jurisdiction, at that time refrained from directing that the value should be estimated according to the rules of the Stamp Acts which might be passed from time to time, as had before been the case, it must have done so advisedly.

On the whole, I am not prepared to differ from the decision of the Division Bench in *Jeebraj Singh v. Inderjeet Mahtoon* (1) to which I have already referred; and it follows in my judgment that we must give effect to the objection which has been made in special appeal. It is admitted that there is no evidence upon which it can be sent back to the lower Court with any chance of success for the plaintiff in regard to the reassessment of the value of the property. Accordingly, the suit is dismissed for want of jurisdiction.

The plaintiff must pay the costs of the defendant in this Court and in the lower Appellate Court.

Appeal allowed.

(1) *Ante*, p. 115.

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* P. C. G. C. W. FORESTER AND OTHERS (PLAINTIFFS) v. THE SECRETARY OF
1871 STATE FOR INDIA IN COUNCIL (DEFENDANT).
Nov. 6

1872 [On appeal from the Chief Court of the Punjab.]
May 11.

Jurisdiction—Act of State—Evidence—Lost Sanad.

Where lands were held by a *jagirdar* under the sovereign of an independent State on a *jaidad* tenure, i.e., on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the sovereign, and on the conquest of the State by the East India Company, the *jagirdar* remained in the same position to the Company, *Held* that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the *jagirdar*, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the *jagirdar* against the Government for the possession of the land, and for the value of the arms and stores. This was so, although at the time of the resumption, the Regulation law was not introduced into the territories in which the *jagir* was comprized.

Where an alleged original *sanad* was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient *sanads* by Regulations II of 1819, s. 28, and XIV of 1825, s. 3, and taking all the circumstances into consideration, refused to consider the title under it established.

Where the evidence showed that the arms and stores seized had been purchased by the *jagirdar* before the resumption, and there was no authority or evidence to show that those who held by *jaidad* were not entitled to things so purchased, *Held* that the representatives of the *jagirdar* were entitled to recover the value of the arms and stores so seized.

THESE were two appeals in cases known respectively as the "Badshapore Suit" and the "Arms Suit."

The first was an appeal from the decree of the Chief Court of the Punjab, dated the 19th March 1867, by which the decree of the Commissioner of the Hissar Division, dated the 23rd

*Present:—THE RIGHT HON'BLE THE LORD CHANCELLOR HATHSBLY, LORD WESTBURY, SIR J. W. COLVILE, SIR JOHN STUART, SIR M. E. SMITH, AND SIR LAWRENCE PHEL.

May 1866, and passed on appeal from the decree of the Deputy Commissioner of Delhi of the 4th July 1865, was affirmed, and the appellant's suit dismissed with costs:

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The suit was brought in August 1848 by the committee of one David Ochterlony Dyce Sombre, a lunatic, since deceased, to recover possession, with mesne profits, of an estate, called Pergunna Badshapore Jharsa, lying on the west bank of the river Jumna, in the district of Goorgaon, which had been granted and devised to the plaintiff by Zebooluissa Begum, otherwise called the Begum Sumroo (or Sombre), and which had been taken possession of by the Government of India on the death of that lady in 1836. The appellants were the representatives of the original plaintiff. The Begum Sombre, or Sumroo, was the widow of one Walter Reynard, *alias* Raymond, better known as General Sombre, a French soldier of fortune, who had raised troops, and served with them under various native princes, and, in the latter part of his life, under Scindia. For the maintenance of these troops, Scindia had granted to Reynard as *jaidad* (1) certain lands lying in the Doab, a district on the eastern bank of the Jumna, and the grant was continued to his widow, the Begum Sumroo, who, after the death of her husband, which occurred in 1778, retained the troops raised and commanded by him in Scindia's service. Reynard left an only son, Aloysius Reynard, *alias* Nawab Zuffer Yab Khan; but the latter, who died about 1801, left his stepmother, the Begum, in undisputed possession of his father's command and estates, and she thus became a *jagirdar*, under Scindia's government. Pergunna Badshapore Jharsa, the property in dispute in this suit, was wholly distinct from the *jaidad* lands in the Doab; it was situate on the opposite or western bank of the Jumna, and was said by the appellants to have been granted in *altamgha* by the Emperor of Delhi, the late Shah Alum, after the death of Reynard, to his son Zuffer Yab Khan in the first instance, and afterwards, in supercession of him, to the Begum

(1) "A grant of a certain district, called upon, in the service of the together with the public revenues of sovereign, of whom the *jagir* was it, on the condition of keeping up a held."—See the judgment of the Judiciary of troops, to be employed, when cial Committee, *post*, p. 147.

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Sumroo, by an *altamgha sanad*, which was subsequently confirmed by Scindia, in whose territory the property lay, about the year 1795.

In 1803, when war was impending between the East India Company and Scindia, it became important to gain over, if possible, the Begum from Scindia, and letters of the 20th May and 22nd July 1803, from Lord Wellesley to the Begum, written some months before the battle of Assaye, fought by General Wellesley in the Deccan, on the 23rd September of that year, and when the power of Scindia was broken, show the terms of friendship, conciliation, and promise in which it was thought proper to address her.

After the battle of Assaye, the letters addressed to the Begum were somewhat more peremptory in tone, though still of a friendly and conciliatory character. The result of the influences brought to bear on her was that she definitively abandoned the cause of Scindia (and afterwards of Holkar), recalled her troops, and threw herself unreservedly on the side of the East India Company, whose faithful supporter she continued to be up to her death. She also, at the request of the Government, consented, by a letter, which was received on the 5th December 1803, to exchange her *jagir* lands in the Doab for lands on the other side of the Jumna; and she expressed her trust in the Governor-General that, in consideration of her readiness to meet his wishes, and her friendly feeling towards the Company, the possession of those lands would be secured to her in perpetuity.

With reference to this letter, a copy of which had been submitted to him, Lord Lake wrote to Lord Wellesley on the 23rd November 1803 that, pending the determination as to what portion of territory might be most advantageously and conveniently assigned to the Begum in lieu of her then *jagir*, it would be advisable to consider the consent therein given by her as binding, except as regards the necessary details to be entered into for concluding the transfer which, Lord Lake observed, might "be rendered essentially beneficial to the interests of the British Government, both by completing the undivided possession of the Doab, and by placing a power, hitherto of con-

siderable importance and influence in that quarter, upon a troublesome frontier."

Lord Lake continued:—

"From the correspondence of Lieut.-Colonel Ochterlony, I learn that the Begum has frequently intimated an earnest wish to receive from the British Government some title expressive of friendship, or some dignity which may evince the confidence which the Government reposes in her. Your Excellency may perhaps be inclined to indulge this wish in the terms of the transfer of her *jagir*, either by some addition to the titles hitherto used in the address to the Begum, or by permitting the country to be now assigned to be considered as a sovereignty under the protection of the British Government, with the customary stipulation of service when her troops may be required."

In answer to this letter, Lord Wellesley wrote to Lord Lake on the 23rd of December 1803 as follows:—

"The conduct of the Begum on this occasion appears to merit the entire approbation of this Government, and to justify her pretensions to any indulgences, consistent with the security and interests of the British Government, calculated to reconcile her to the arrangement to which she has consented for the transfer of her possessions in the Doab.

"I have therefore deemed it advisable to adopt the suggestion contained in the last paragraph of your Excellency's despatch, by permitting the country to be now assigned to be considered as a sovereignty under the protection of the British Government, without any other condition than the customary stipulations of service whenever her troops may be required, and of submitting to the arbitration of the British Government any differences which may eventually arise between her and any other State or Chieftain.

"I have accordingly addressed a letter to the Begum, signifying my approbation of her conduct, and my satisfaction at her consent to the proposed transfer of her possessions, apprising her of my resolution to guarantee to her the independent dominion over the territory which will be assigned to her on the western side of the Jumna in exchange for her present *jagir*, and referring her to your Excellency for the details of this arrangement.

"My letter to the Begum is enclosed, together with a copy, for your Excellency's information.

"It is of the most urgent and serious importance that the

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British authority should be established in the territory composing her present *jagir* at the earliest practicable period of time, and I request that your Excellency will immediately adopt the necessary measures for that purpose, and for the assignment of an equivalent portion of territory on the western side of the Jumna.

"I trust that the Begum may be induced to admit the introduction of the British authority into her *jagir*—without awaiting the actual transfer of an equivalent territory, which it may require some time to effect—under an assurance of ample compensation for any loss of revenue which may be occasioned by the delay.

"It will be proper that written engagements should be executed on the part of the British Government and the Begum, stipulating for the proposed exchange of territory, and the obligations to be imposed on both parties by the projected arrangement."

The letter to the Begum mentioned in the above letter to Lord Lake was of the same date, *viz.*, the 23rd December 1803. In that letter Lord Wellesley expressed to the Begum his satisfaction at the sentiments expressed by her in her letter of the 5th December, and at the "judicious and amicable course" which she had adopted in her ready acquiescence in the suggestions for the recall of her battalions, and in the assignment to her of territory on the western side of the Jumna in exchange for her possessions in the Doab; and after saying that he had instructed the Commander-in-Chief to conclude engagements with her on the basis of the proposed assignment, he continued:—

"With a view to manifest the sense which I entertain of your meritorious conduct on this occasion, and to afford you ample compensation for the relinquishment of your present *jagir*, I have resolved to guarantee to you the independent possession of the territory which will be assigned to you under the proposed arrangement, without any other condition than that of affording to the British Government the aid of your troops whenever it may be required, and of submitting to the arbitration of the British Government any differences which may eventually arise between you and any other State, or Chieftain.

"His Excellency the Commander-in-Chief will adopt, as soon as possible, the necessary measures for transferring to you a portion of territory on the western side of the Jumna equivalent to that which you have ceded in the Doab. I trust, however, that you will not delay the actual cession of your present *jagir* to the authority of the British.

Government until the assignment of an equivalent portion of territory, which must necessarily occupy some time before it can be effected. You will receive ample compensation from the British Government for any loss of revenue which may be occasioned by the delay in selecting, and transferring to your authority, the district to be assigned to you on the western side of the Jumna."

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By a treaty of peace, dated the 30th December 1803—and subsequently rendered final by another, dated 22nd November 1805—between the East India Company and Scindia, the latter ceded to the Company (*inter alia*) all his territories in the Doab, and also the territory to the west of the Jumna, in which Pergunna Badshapore Jharsa lay. It does not appear, however, that any seizure or resumption of any lands or revenue granted by the former rulers, and held and enjoyed by individuals, was made by the East India Company on this transfer of the sovereign power. The effect, therefore, of the transfer was, that the Begum became the subject of the East India Company, in respect of, and as beneficially entitled to, Pergunna Badshapore Jharsa, just as any other proprietor; and as to the *jaidad* in the Doab, in case the proposed transfer should not be carried out, she remained entitled thereto for her life, subject to the obligation attached thereto of maintaining troops, and in case the transfer should be carried out, entitled to be raised to the position of a petty sovereign, owing allegiance to, and protected by, the East India Company. In the year 1805, Regulation VIII of 1805 was passed by the Governor-General of India in Council, which, by referring to the treaty with Scindia of the 30th December 1803, and the territory mentioned therein, clearly included the whole of the lands of Badshapore Jharsa, and that Regulation expressly extended the laws and regulations, which had been established for the internal good of the provinces ceded by the Nawab Vizier, to the whole of the above territory. The above-mentioned exchange of territory was never carried out, in consequence of the change of policy, which seems either to have immediately preceded, or to have followed, the resignation of Lord Wellesley, and the appointment of Lord Cornwallis as Governor-General of India.

The Begum Sumroo had throughout continued ready to carry

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out her engagement, although she had complained strongly of the pain to her own personal feelings, and the heavy pecuniary loss which would be occasioned by her leaving Sirdhana, where she had expended large sums of money; she also complained of having had to pay certain arrears of pay to her troops which were due from Scindia, and for which she seems to have in vain sought compensation from the East India Company. In consequence of this discontent, and of certain rumours circulated against the Begum, and also, apparently, of the defeat of Holkar in 1804, Lord Wellesley had at one time adopted a much less conciliatory tone towards the Begum. In a letter of the 15th February 1805, addressed to Lieut.-Colonel Ochterlony, His Lordship threatened the annexation of the lands in the Doab, without assigning any equivalent, if the Begum acted with treachery; but at the same time intimated to Colonel Ochterlony that he was to consider himself at liberty, if he deemed it advisable, to alter the proposed arrangement with her according to his judgment, and to continue her *jagir* to her in the Doab. This was the last letter that appears to have been dictated by Lord Wellesley on this subject, and nothing further was done by him prior to his retirement in the following July.

Lord Cornwallis immediately on his arrival adopted a different tone.

On the 6th of August 1805, a letter was written under His Lordship's orders by Mr. Malcolm, the Resident, to Mr. Guthrie, the Collector of Saharunpore, in which it was stated that it was considered a matter of importance to adopt every measure to maintain the tranquillity of the Doab, and secure it against foreign invasion; that it was particularly necessary to conciliate the Begum; and (after adverting to the equivocal behaviour on her part) that the best means of retaining her in duty and attachment to the Government would be to give her a most positive assurance that she should remain for her life in the possession of the *jagir* in the Doab on the same terms on which she then held it. This letter authorized Mr. Guthrie to investigate certain pecuniary claims advanced by the Begum, and to give the assurances as to her retaining her *jagir*, if necessary, in writing.

On the 16th of August 1805, Lord Cornwallis wrote to the

Begum, informing her that, in consequence of her faithful service, she should not be subjected to the pain of having to leave Sirdhana and give up her old lands in the Doab for new lands, but that the Governor-General had "resolved to leave her in the unmolested possession of her *jagir*, with all the rights and privileges which she had hitherto enjoyed," in the expectation that she would cordially assist in preventing attempts to disturb the tranquillity of the Company's territory. In pursuance of the intention expressed in the last letter, Mr. Guthrie was sent to Sirdhana with the terms of the following agreement, which was signed by the Begum in August 1805, and afterwards ratified by the Governor-General.

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"Those places in the Doab which have formed the *jaidads* of Zeboolnissa Begum, shall remain to her (as before) from the Company as long as she may live. The troops of the Begum shall, according to custom, be always ready in the service of the East India Company. The Begum, in every instance, considering herself a faithful dependant and friend of the Company, shall perform all the duties required from a dependant and friend, and shall not hold any intercourse whatever, either by agent or by letter, with any State or Power, or with the friends or dependants of any State or Power, or with the enemies or refractory subjects of the Company, or with any State or Power whatsoever, but that of the Honorable East India Company."

From the very first the Government of India appears to have considered that the rights of conquest, confirmed by the treaty of the 30th December 1803, ought not to be exercised to the Begum's prejudice.

By his letter to Lord Lake of the 23rd December 1803, Lord Wellesley admitted that the Government could not, in fairness, establish British authority, or introduce British law, into the territory composing the Begum's Doab *jagir* (1). Again, in the end of 1805, some question having arisen as to the propriety of the Magistrate of Meerut exercising jurisdiction within the Begum's *jagir*, the matter was referred for the orders of Government; and on the 8th of March 1806, the Secretary of Government wrote to the Resident at Delhi a letter, of which the following is an extract:—

"I am directed to inform you that, according to the terms of the

(1) *Ante*, p. 123.

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engagement concluded with Begum Sumroo under the authority of Government, the operation of the British laws and regulations is not to extend to her *jagir*; and considerations both of a general and peculiar nature render it highly inexpedient, in the judgment of the Governor-General in Council, to propose to the Begum any modification of those terms with a view to remedy the eventual inconvenience described in your despatch. The Begum, however, has hitherto manifested the utmost readiness to comply with any requisition on the part of the British Government for the surrender of persons accused of crimes, and it is the wish and direction of the Governor-General in Council that, whenever the surrender of persons residing or taking refuge in the Begum's *jagir* shall be necessary for the ends of justice, an application for that purpose be addressed to her through the channel of the Resident at Delhi."

And at a yet later period, Mr. Fraser, the Resident at Delhi, having attempted to check what he considered mal-administration on the part of the Begum's officers, the following letter was addressed to him in 1834 by the Secretary to the Government:—

"I am directed to acquaint you that the explanation which you have furnished to account for your having interfered in the affairs of Begum Sumroo's *jagir* are wholly insufficient. As long as Her Highness lives she must be considered as independent, and at liberty to intrust the administration of her affairs to any persons she may please to select. We have no right to presume mismanagement on account of Her Highness's great age, and to found any interference upon such presumption. If any gross injustices were perpetrated by Her Highness or her officers, it would furnish a fit subject for reference on your part for the consideration and orders of the Supreme Government, but nothing which you have urged is calculated to justify your direct interposition."

In the year 1806, Juliana Reynard, the daughter of Aloysius Reynard, married George Alexander David Dyce, who by that marriage had a son, the original plaintiff above-named, David Ochterlony Dyce, who afterwards took the name of Sombre. In consequence, apparently, of this marriage, the Begum became desirous of having a permanent provision made after her death for her daughter-in-law, the widow of Aloysius Reynard, Mr. Dyce, and her numerous military and other dependants; and with that view addressed a letter, dated 8th July 1807, to the Resident at Delhi, in which she asked that

such provision might be taken into consideration by the Government, and "such measures adopted before my demise as they may deem most expedient for the protection and support of my family and connexions, by bestowing upon them, for their enjoyment after my death, a permanent provision for life, either by conferring upon them grants of land now forming part of my possessions, or fixing a monthly sum adequate to their maintenance for life, as may be deemed by the British Government most proper. To obtain this object so much at my heart, I take the liberty of stating that the total amount of the allowances requisite for the above purposes is Rs. 7,500 per mensem."

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This application was favorably received by the then Governor-General, Lord Minto; and a list was forwarded by the Begum, showing the details of the pensions she wished to have granted. While the correspondence was still proceeding in the matter of the pensions, and some months before forwarding the list last referred to, the Begum, apparently from the same motive of providing for her husband's family, applied to the Emperor of Delhi for, and obtained from him, a grant in *altamgha* tenure of Pergunna Badshapore Jharsa to George A. Dyce and his descendants.

This application was not made with any secrecy; and the matter having, therefore, come to the knowledge of Mr. Seton, the Resident at Delhi, he addressed a letter, dated the 24th February 1808, to Mr. Edmondstone, the Secretary of the Government of India, in which he informed the Government of the circumstances under which the grant had been made, and expressed his opinion that what had occurred was an irregular exercise of power on the part of the King, considering the position in which he stood with regard to the Government, who in taking the King, and royal family of Delhi, under its protection, and in paying to His Majesty a larger stipend than the amount of the annual produce of the assigned territory, virtually acquired a right to expect to be consulted by His Majesty previously to the adoption of any measure, the operation of which tended, either directly or indirectly, to diminish the value of the assigned territory, and that it had more especially the privilege of interfering for the regulation, and even the prevention, of

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all alienations of land from either the taxed or taxable portion thereof. The Resident also informed the Government of another grant of a similar nature by the King of the village of Bhutgong in Pergunna Soneeput to Mr. George Dyce and his descendants as an *inam altamgha*.

The Government of India adopted the views of the Resident, and, as appears by a letter of the Secretary of Government to the Resident, dated the 15th February 1808, without having the grants examined, and on an assumption that Badshapore Jharsa formed part of the Begum's *jagir*, out of which the pensions for her dependants were to be granted, directed the Resident to persuade the Begum to surrender the *altamgha* grant. His efforts to do so at first wholly failed; but on the 16th February 1811, as the result of the persuasion and inducements held out by the Resident to her, the Begum addressed to him a letter, from which the following is an extract:

"At the time I solicited a provision for my family and dependants, I had, as I still retain, a firm conviction in my own mind that the pergunna of Badshapore, and the villages of Bhogeeppoor and Bhutgong, were held as *altamgha* to my late son, and would consequently revert to my adopted son George Alexander David Dyce, in virtue of his marriage with my granddaughter. On this subject, doubts have arisen respecting the nature of the grants, which are not now to be found in the family records. I consequently cannot urge a positive right; but trusting to the munificence of the British Government, and to the extensive possessions which will revert to them at my death, as well as to the local position of Badshapore, I am induced to hope that you will extend the friendship you have ever shown to me, to the interests and prosperity of my adopted son (for whom I feel a truly maternal affection), and that, by your representations to the Right Honorable the Governor-General, you will second and support my earnest entreaties that the provision made for my said adopted son may not depend on the uncertain tenure of his life, but be extended to his family and descendants, male or female, and bear some proportion to the value of the lands, which are well known to you, and to which I at first supposed he would succeed by right of inheritance."

She also asked that the village of Bhutgong might be considered included in any arrangements which the Government might adopt.

To this letter the Resident replied, on the next day, as follows:—

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"I assure you that I have not the smallest doubt of your conviction that the lands were held under the tenures which you describe, and that your object in soliciting the new grants from His Majesty, the present King of Delhi, was rather to obtain the confirmation of existing grants than the creation of new. Still, however, as you yourself admit that the old grants are not to be found among the family papers, and as, under that circumstance, the confirmation of the new grants might lead to the introduction of a practice, as well as of a principle, injurious to the rights of the British Government, I confess I am of opinion that, much as the Right Honorable the Governor-General desires to comply with your wishes, His Lordship might find it difficult to reconcile that, which to himself individually would be a high gratification, with his reluctance, on public grounds, to introduce, and even to sanction, a precedent of such dangerous operation. But, as that objection would be done away by the annulment of the present grants, I think it highly probable that His Lordship's wish to relieve your mind from a source of anxiety so truly honorable to your feelings, might induce him to bestow the lands upon your heirs in the manner you desire, if that objection were previously removed by the annulment of the grants obtained by you from His present Majesty. On this ground I think it my duty to request you to consider whether your soliciting the King to cancel the grants in question might not eventually tend to the attainment of the object which you have evidently so much at heart. I also conceive that the British Government will expect to be furnished with a statement of the actual produce of the lands to which your application relates."

On the 20th February 1811, the Resident forwarded to the Government copies of the two last-mentioned letters, inclosed in a letter, in which he spoke of the pain the "sacrifice" has caused the Begum, and submitted to the Governor-General in Council the propriety of giving effect to her desire. On the 9th March 1811, the Secretary to the Government replied to the last, expressing the gratification of Government at the success of the Resident's endeavours, but stating that it was not then necessary to determine the question as to the grant in perpetuity of Badshapore Jharsa. No further correspondence was put in between that time and April 1823, when some letters

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passed between the Collector of Meerut and the Secretary to the Board of Revenue in the Western Provinces, relative to some investigation, under the Resumption Regulation, II of 1819, set on foot by the Collector of Meerut in respect of the Begum's title to certain villages. This correspondence appears not otherwise important than as showing that at that time there was no suggestion as to her being a sovereign princess, or that, in the event of her having been found in possession of any villages without title, they would not have been resumed by an ordinary proceeding in the Courts of law under the provisions of that Regulation, the applicability of which was not then doubted.

In December 1825 and January 1826, as appeared from letters produced by the Government of India, in consequence of some family quarrels between the Begum and Mr. George Dyce, she affected to contemplate the surrender of her *jaidad* and *jagirs* to the East India Company; and Mr. Dyce then protested against it on the ground that, on his marriage with the legitimate daughter of the son of Sombre, Badshapore, and some other lands, had been by certain *sanads* granted to him and his family in *jagir*. He apparently referred to the *sanads*, or grants, which in 1808 had been objected to, and was informed by the Resident that the validity of the *sanads*, or grants, under which he claimed, could not be allowed. The matter then dropped, and the surrender, which the Begum had probably only threatened from irritation against Mr. Dyce, was not made.

On the 16th December 1830, the Begum signed, sealed, and published her will in the English language, which was subscribed by a number of witnesses, including two or more English officers of rank, and of which a copy was forwarded by her to Mr. Martin, the then Resident at Delhi, in order to be deposited in the Residency office. By that will, after various legacies, she devised, together with all other lands of which she might have power to dispose at the time of her death, "all that province called Badshapore Jharsa," to David Ochterlony Dyce, her adopted son, his heirs and assigns for ever; and she thereby requested that he would assume the name of Sombre.

On the 20th October 1831, the Begum wrote to the Government expressing a desire to settle the Pergunna of Sirdhana on

her great-grandson D. O. Dyce Sombre in perpetuity, "so that he may enjoy the same, together with Pergunna Badshapore, and other villages, which the deceased Nawab his grandfather was possessed of, on an *altamgha* tenure." To this a reply was sent on the 7th November 1831; and another, on the same subject, on the 14th March 1832, in reply to a letter of the Begum to the Governor-General relating to her will; but the Begum was informed, in general terms, that she could not be allowed to alienate in perpetuity her *jaidad* land (referring to Sirdhana), and which, under the terms of the engagement of August 1805, she was told she was entitled to only for life. A letter, from the Begum to the Governor-General, without date, but written sometime in 1832, apparently in reply to the last-mentioned letter, appeared to have contained copies of title-deeds, on which she relied to show her right to an hereditary estate in Badshapore, and which she described as "*my altamgha*."

On the 26th September 1832, in reply to her last letter apparently, the Governor-General, Lord William Bentinck, wrote and sent to the Begum a letter, assuring her that all her possessions which were of the nature of private property, would be religiously respected, and the demands of the State strictly confined to what came under the head of public revenue. The reply of the Begum to this was as follows, dated 1st March 1833:—

"I now most earnestly entreat your Lordship's attention and consideration to the grants of the pergunna of Badshapore Jharsa and the village of Bhogeepeer Shahgunge, in the name of my husband's son, Louis Balthazer Sombre, known by the style and title of Moozuffer-ood-dowlah Moontazool Moolluck Nawab Zuffer Yab Khan Bahadur Moozuffer Jung, these grants, one *altamgha* of hereditary, and one entirely independent of the public revenue, having been given in-rent-free hereditary possession, by *altamgha*, to my husband's son as before-mentioned, *sanads* of which I have in my possession. And therefore it is my fervent wish to obtain your Lordship in Council's decision upon this point in my lifetime, as I have given to my adopted son David Ochterlony Dyce (grandson of my husband's son), the above-mentioned pergunna and village as his inheritance, it being the only property his grandfather possessed, and which is, as before mentioned, quite independent of public revenue."

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The Government replied to this, on 30th April 1833, that it had always been understood that the villages mentioned in her letter were held on a life tenure only; that this had been admitted in her previous letter to Mr. Seton, dated 8th July 1807; and that such admission was conclusive of her claim. The correspondence continued throughout January and February 1834, and in one letter, dated 29th January 1834, from Lord William Bentinck to the Begum, in reply to one from her asking on what grounds the objections of Government to her claim to the villages in the pergunnas of Burwanah and Boodhana rested, was the following:—

“I have to refer you to the deed of agreement between yourself and the British Government, concluded through the medium of Mr. Guthrie, in August 1805, the first sentence of which is as follows:—‘Those places in the Doab which have formed the *jaidad* of Zebboolnissa Begum, shall remain to her (as before) from the Company as long as she may live.’ This document constitutes the title under which you hold your estates in the Doab, and it would appear from it that your rights are limited to those places which actually formed part of your *jaidad* at the period in question.”

In a letter dated 21st February 1834, the Begum sent five *sanads* relating to Badshapore Jharsa to Mr. Fraser, the Resident at Delhi (who wrote a letter acknowledging their receipt), with a request that he would forward them to the Government for their consideration. This the Resident declined to do, on the ground that all the points referred to in them had been settled in the Governor-General’s letter dated the 30th April 1833: and the *sanads*, as was stated by the appellants, were apparently not returned to the Begum.

On the 17th April, 1834, the Begum, still insisting on her right to an absolute estate in Badshapore Jharsa as her *altamgha*, and in pursuance of her intention, previously expressed to the Governor-General, executed a deed of gift, by which she gave to David O. Dyce Sombre, her adopted son, the whole, with certain exceptions, of her real and personal estate, including “the Pergunna Jharsa Badshapore, which stood recorded in her name as an *altamgha* ;” and it was therein declared that she had made over the same in proprietary posses-

sion to him, and that he had accepted the gift and taken the same into his own possession. This deed was attested by the Magistrate of Zilla Meerut and several English officers, and the Magistrate and Resident at Delhi reported the matter to Government, submitting a copy and translation of a letter from the Begum relative to the deed of gift, and requesting instructions for his guidance in case of the Begum's death. Upon this the following letter, dated the 5th June 1834, was sent to the Resident by Mr. Macnaghten, the Secretary to the Governor-General:—

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"2. With regard to the personal property of the Begum, or the houses, gardens, &c., which are not to revert to the Honorable Company on her death, the Governor-General is not aware that any interference on your part will be necessary, unless a dispute should arise as to the succession, in which event you will interfere so far only as may be requisite for the preservation of the public peace, putting such party in possession as you may conceive to have the best right, pending the result of a more formal investigation.

"3. With regard, however, to the territorial possessions of the Begum which lapse to the Company on her death, you will, of course lose no time, when that event may occur, in proclaiming the transfer, and prohibiting the payment of any revenue to persons other than those authorised by you to receive it on behalf of Government. It would be advisable that one of your assistants should be deputed into the pergunna on the occasion.

"4. His Lordship is not prepared to determine what measures should be adopted with regard to Her Highness's troops. It might not be expedient to discharge them at once, and their services perhaps could not suddenly be dispensed with. You will be pleased to report your sentiments at length on this subject: and should Her Highness's decease take place in the interim, you will make no change in the number or disposition of her troops.

"5. You have not noticed Her Highness's application for a title in favor of Mr. Dyce. Should she renew this application, His Lordship would wish that Her Highness be asked to explain the description of title which she is desirous of having conferred on that individual."

On the 27th January 1836, the Begum died at Sirdhana, and on the following day, the Collector and Magistrate of Meerut had a proclamation read, "announcing the *jagir* annexed to

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the British Government, and becoming subject to the Regulations in force in the territories under the Company, and under the sole management of the Government officers, whose orders were alone to be obeyed, the authority of those under Her late Highness having ceased with her demise." Possession was also taken, under the protest of the said D. O. Dyce Sombre, of the arms and military stores.

On the 29th January 1836, Mr. Thomas Metcalfe wrote to David O. Dyce Sombre:—"I fear I must proceed to the resumption of Pergunna Jharsa." And on the 4th February 1836, Mr. C. Gubbins, the Collector of Goorgaon, took formal possession of Badshapore Jharsa, and thus resumed it on behalf of the Government, as a matter in the ordinary course of his duties as revenue officer. On the 5th of March 1836, the Collector of Meerut addressed a letter to the Commissioner of Meerut, and sent him copies of the *sanads*, under which the Begum had held her *jaidad* lands in the Doab, and also a copy of the *sanads* relating to Badshapore, observing with respect to the latter:—"But that pergunna not being situated within the Doab, there is no necessity now to discuss its merits." A copy of a letter written on the 11th March 1836, by Mr. Dyce Sombre, to the Collector, was put in, in which, after putting forward a claim to all the arms and military stores of the late Begum, he continued:—

"With reference to the 2nd para. of your letter, I beg to say that I have already forwarded to you the copies of the *sanads* by which Her Highness held her *jaidad*, and the Pergunna of Badshapore, in *altamgha* assigned to her by the former rulers of Hindustan long antecedent to the British sway of this adjoining district. I also annex a copy of the agreement with his Excellency Lord Lake, when the *jagirs* which had been so assigned to Her Highness were confirmed to her by the British Government. In virtue therefore of these *sanads* I claim as my private property all the lands, arms, &c., in fact, property of every denomination (belonging to Her late Highness), which is not otherwise mentioned in the said agreement; or in other words, that I consider only her *jagirs* within the Doab to have devolved on the Hon'ble Company by the wording of that agreement; all the lands situated beyond the two rivers having been devised to me by Her late Highness."

On the 4th of May 1836, Lord Metcalfe, writing to Lord Auckland, said :—

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"9. At the peace, Scindia's territory in the Doab, and vicinity of Delhi, including all in her (the Begum's) lands became ours by cession, as they were before by conquest; we might have resumed the land, discharging her and her brigade, or have retained her and her troops in service on any terms that we approved. The course pursued was to enter into engagements with her by which she was allowed to retain the territory on the former footing, and the troops were to be at our disposal, three battalions or one-half to be always employed on our service; we were equally entitled to the use of the whole, but such was the engagement entered into, and we adhered to it to the day of her death."

Again, on the 20th May 1836, the Collector of Meerut wrote to Mr. Hutchinson, the Commissioner of Revenue, as follows :—

"Copies of the tenures (on which the Begum held the pergunnas situate in the Doab, and that of Badshapore) are herewith submitted, and a reference to them will at once show that the Doab pergunnas were held for the maintenance of troops, whilst that of Badshapore was enjoyed as a private possession, without any stipulation or agreement. There could, therefore, be no question as to the right of the heirs to whatever might be due to the Begum (although succession to the *jagir* may be barred) in the pergunna of Badshapore, but the same private right has never been recognized in the Doab pergunnas; on the contrary, they are viewed as having been only a life-grant for a specific purpose, wholly public, not investing any private or personal right in property devisable by will."

In another official letter from the Collector of Meerut to the Commissioner of that district, dated the 27th December 1836, was the following paragraph :—

"I have already, in my letters to your predecessor, observed that the grant under which the Begum enjoyed Badshapore differed from that under which she held the pergunnas in the Doab, in that the former was for her own benefit, while the latter was solely for the maintenance of a military contingent, without conferring a property either on the Begum or her heirs. I am not aware whether copies of the *sanads* were furnished to the Board, but they were transmitted to the Government, and as the question is one of considerable importance, its decision is looked forward to with much interest."

On the 4th July 1836, Mr. Dyce Sombre wrote to the

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Lieutenant-Governor of the North-Western Provinces on the subject of his title and claim to Badshapore Jharsa, and also to the military stores and arms. He therein asserted his right to Badshapore as devisee of the Begum, who had held it on wholly different terms from her *jaidad* lands. On the 30th July 1836, a reply was written by the Secretary to the Government of the North-Western Provinces rejecting the claim, on the ground that the possessions claimed by David Ochterlony Dyce Sombre "were conquered by the arms of the Honorable Company, and the Begum was allowed to hold them precisely on the same footing as the *jaidad* in the Doab;" and adding,— "It was a portion of Scindia's territories conquered by the British Government, it might have been resumed at will, but it was, by the agreement alluded to, secured to the Begum for her life." This letter, however, at the same time claimed both the *jaidad* and Badshapore Jharsa, as having "lapsed" on the Begum's death to the Government, the nature of the tenure, giving her, as alleged, only a life-interest.

Mr. Dyce Sombre having appealed to the Governor-General in Council from the decision of the Lieutenant-Governor, his appeal was rejected on the 21st November 1836. On the 17th October 1839, the Court of Directors rejected Mr. Dyce Sombre's appeal from the decision of the Government of India; and on the 14th June 1842, the Commissioners for the Affairs of India refused him an interview which he had asked for, relative to his claims, and referred his application, for "possession of the documents bearing on the claims," to the Court of Directors. On the 8th of August 1842, Sir Robert Peel also refused to entertain an appeal which had been made to the Crown. Under a commission *de lunatico inquirendo*, on the 30th July 1843, the above-named D. O. Dyce Sombre was found to have been of unsound mind from the 27th October 1842. On the 8th February 1844, Mr. Larkins was appointed committee of his estate, and a case having been laid subsequently by Mr. Larkins before Counsel, and the opinion given thereon having been brought to the notice of the Lord Chancellor, His Lordship, on the 5th August 1847, ordered Mr. Larkins, as such committee, to institute the present

suit. Accordingly, on the 17th August 1848, the original plaint was filed in the Court of the Principal Sudder Ameen of Zilla Delhi (then governed as to all civil and criminal suits, by Act V of 1832), on behalf of D. O. Dyce Sombre, a lunatic, by his committee, as plaintiff, against the Collector of Zilla Goorgaon, on the part of Government, as defendant, to recover possession of the *altamgha jagir* of Badshapore Jharsa with mesne profits. The plaint set forth the plaintiff's title as above stated, and complained of the illegal taking possession by the Collector of Badshapore Jharsa without the institution of proceedings under Regulation II of 1819, and so giving the plaintiff a full opportunity of proving his title thereto.

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On the 30th December 1848, the Collector of Goorgaon, on behalf of the Government of India, put in an answer, wherein various defences were raised: the material objections being as follows, *viz.*, want of jurisdiction in a Civil Court; limitation under Regulation II of 1803, s. 18, cl. 3; the non-applicability of Regulation II of 1819 (the Resumption Regulation) to the province of Delhi; and lastly, that, under the agreement and the alleged understanding between the East India Company and the Begum, her interest in Badshapore Jharsa was limited to a life-interest.

On the 5th February 1849, the plaintiff's replication was filed, in which he again distinctly alleged that Badshapore Jharsa was, in contradistinction to the *jagir* lands in the Doab, "held by the Begum by virtue of a free *altamgha* grant in perpetuity." On the 24th February 1849, the rejoinder was filed, in which the only point repeated was the plea to the jurisdiction under Regulation XVII of 1836, s. 3, no allusion being made to the *sanad*. On the 13th February 1849, the case was transferred to the Judge's Court.

The record of the original case was destroyed during the mutiny of 1857; and it did not appear what issues were framed by the Judge in 1849, or whether any issue was raised as to the jurisdiction of a Civil Court over the plaintiff's claim, by reason of the taking possession of Badshapore Jharsa having been an act of State: but no question was then raised as to the genuineness of the *sanads*.

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On the 9th July 1849, the Civil Judge of Zilla Delhi, to whose Court the suit had been transferred at the final hearing, dismissed the plaintiff's suit, on the single plea of limitation, and without referring to the plea of jurisdiction (1). On appeal, the late Sudder Dewanny Adawlut at Agra, on the 9th December 1850, affirmed the judgment of the Judge, on the plea of limitation, and without reference to jurisdiction or any other matter whatsoever, holding, as the lower Court had done, that the lunacy of D. O. Dyce Sombre was not an exception within the meaning of the Regulation of limitation (2). The plaintiff then appealed to Her Majesty in Council.

While that appeal was pending, on the 1st July 1851, D. O. Dyce Sombre died, and ultimately his widow, who married General Forester, one of the appellants, and the sisters of D. O. Dyce Sombre and their husbands prosecuted the appeal, and the judgments being reversed, the case was remitted back to the Courts in India (3).

In consequence of the original records of the case having been destroyed, a new plaint was directed to be filed, which was accordingly done by the heirs and representatives of the late D. O. Dyce Sombre, and the trustees of Mrs. Forester's marriage settlement. The answer filed by Government materially differed from the former answer, in that (*inter alia*) it alleged that the Begum Sumroo "was allowed to continue in the exercise of sovereign authority" down to her death, and that the seizure of her estates was one by right of conquest, and in the Government's "political capacity;" and that the plaintiffs' alleged *sanads* had not been granted by the Emperor Shah Alum, or confirmed by Scindia; and that, if so granted, the grant was invalid.

On the 8th May 1865, issues were settled, of which the 4th, 5th, and 6th were as follows:—

"4. Whether the Pergunna of Badshapore Jharsa was granted by Shah Alum to the Begum Sumroo, as mentioned in the plaint?

"5. Whether, if the same were so granted, Shah Alum, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated?

(1) 7 Moore's L. A., 109. (2) 7 Moore's L. A., 113. (3) 7 Moore's L. A., 104.

"6. Whether, if the same were so granted, the said grant was confirmed by Maharaja Madho Rao Scindia, as in the plaint mentioned?"

The other material issues were as to whether the Begum had power to dispose of the *jagir* by deed or will; whether the East India Company was bound by the grant, or by the Begum's disposition; and whether the Company took possession of the *jagir* as an act of State, so as to oust the jurisdiction of the Municipal Courts.

On the 9th May 1865, the plaintiffs presented a petition, asking for a *subpœna duces tecum*, to the Government of India, to produce an office copy of a letter of Lord Lake to the Begum, dated the 29th October 1804, referring to the *altamgha jagir*, of which the original had been lost; an original letter dated the 18th April 1834, from the Collector of Meerut to the Secretary of Government, relating to the execution of the deed of gift by the Begum; an original letter dated the 19th March 1836, from the Commissioner of Meerut to the Collector, acknowledging receipt of the *sanads*; the *sanads* or *firman*s themselves; the King of Delhi's registers, received by the Government after the mutiny, in which the *sanads* of Badshapore were alleged to have been registered; the records of the canungoes of Badshapore; the issuing of a requisition to the Maharaja of Scindia, to inquire whether the confirmation of the *sanad* alleged by the plaintiffs appeared on his records; and *subpœnas* to Mr. Forbes, Collector of Meerut, to appear and give evidence and procure certain specified documents, and to Mr. Fitzpatrick, and one Rao Balmokund. The documents were not produced, and the plaintiffs tendered copies of the alleged *sanads*, which were considered by the Deputy Commissioner inadmissible as evidence; he stating his reasons for so rejecting them after examining them. They also produced an alleged copy of a *perwanna* of confirmation dated 2nd Suffa 1203 F. (2nd November 1788).

These *sanads* were as follows, the first one being called in the record *sanad* No. 3, by which the pergunna of Jharsa, and the villages of Badshapore and Bhutgong (among others) were bestowed upon Zeboolnissa (the Begum), and upon her descendants.

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"From the autumn crop, *viz.*, from the month of Tingo Zail (last month of the Fasli year), as an *altamgha* grant to her from generation to generation, to her children, and those related to her. This grant is to be considered as safe from the strokes of change or alteration. No *peshekush*, or the fees of *subahdari*, *faujdari*, revenue, or other kinds of cess, such as tax or exaction, &c., is to be demanded from this estate; all increase in the revenue or proceeds of the estate proceeding from a good cultivation to go to the grantee. This *sanad* or grant is all-sufficient; fresh confirmation is not to be required year by year. Nothing ought to be done contrary to this grant.

Dated 9th of Zillah of the 30th year of the reign (11th September 1788)."

The other *sanad* dated 19th Shuwall, year 30 of His Majesty (25th July 1788), was to the same effect.

The *perwanna* of confirmation, dated the 2nd Suffa 1203 Fasli (17th August 1795), purported to be in these terms:—

"Be it known to the chowdhries, canungoes, zemindars, and cultivators of the Pergunna Badshapore and Jharsa, that, whereas the aforementioned mehal was formerly granted as an *altamgha jagir* (*jagiri altamghai*) to the kind friend the Begum Zeboolnissa by a royal *sanad*, so it is to be considered on the same footing as before, and all are required as heretofore to present themselves and pay the revenue to her without fail. This is very strictly enjoined, so let them be very careful to obey it."

The Deputy Commissioner dismissed the suit on the ground that the Begum was an independent princess, and the seizure of Badshapore was a seizure by arbitrary power on behalf of the Crown of the dominions of a neighbouring State, and therefore an act of State into which a Municipal Court could not enquire.

The Judicial Commissioner of the Punjab affirmed that decision without going into the question as to the genuineness or effect of the *sanads*.

From that decision the plaintiffs appealed to the Chief Court of the Punjab (Roberts and Boulnois, JJ.), which, on the 19th day of March 1867, dismissed the appeal.

Of these Judges, Roberts, J., placed his judgment solely on the "resumption of the Begum Sumroo's territories on her death, being an exercise of sovereign power towards an

independent State, and a political act over which the Municipal Courts have no jurisdiction;" he considered the case to be governed by the decisions of the Privy Council. Boulnois, J., put his judgment on the same ground as his colleague, declaring "that the act was done by a State against a State;" but he also expressed an opinion that, admitting the copies of the *sanads*, which he thought were receivable, the plaintiffs' evidence had not sufficiently established the making of the *sanads*, and the confirmation by Madho Rao Scindia.

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From this decision the plaintiffs appealed to Her Majesty in Council.

Sir R. Palmer, Q.C., Mr. Leith, and Mr. Doyne for the appellants.—The judgment appealed against rests, so far as the question of jurisdiction is concerned, on two cases—*The East India Company v. Syed Ally* (1) and *The Secretary of State for India v. Kamachee Boye Sahaba* (2); but these are very different from this case. In the former of these cases the East India Company assumed property and lands, which belonged to a wholly independent sovereign, under a treaty between the Company and the Nawab of the Carnatic: in the latter the lands were seized as an exercise of sovereign power, aided by military force, over an independent sovereign. It cannot be said that the Begum held a similar position: she was before the cession by Scindia a mere *jagirdar*, a subject either of Scindia or the King of Delhi, and was transferred to the East India Company as the substituted sovereign power, and so she remained till her death. There could be nothing in the nature of "act done by a State against a State," since, according to the intention of the respondents, the Begum's sovereignty and interest determined and lapsed to the Company upon her death, so that at the time of the assumption in 1836, the lands of Badshapore formed a part of the territories of the Company, and the assumption was, as against Mr. Dyce Sombre, an exercise of authority by the ruling power against a subject, which was cognizable by the Civil Courts?

Boulnois, J., appeared to think that the assumption of the lands

(1) 7 Moore's I. A., 555.

(2) 2 Moore's I. A., 476.

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could be enquired into under the Regulations. Regulation XIV of 1825, however, had effect anterior to the passing of Act XVII of 1836, as it refers to all grants by Scindia or his predecessors; and Badshapore had been so granted. The construction placed by Boulnois, J., on Regulation XXXVI of 1803, is opposed to the clear intention of the Regulation, which was that, where a grant had been actually made and possession obtained under it, but the grant had been set aside thereafter, for what seemed to the ruling power sufficient reasons, the grantee, who had then lost possession, and submitted, should not at a subsequent period be restored to possession, merely on the strength of the original grant. The question of jurisdiction has been waived.

Mr. Forsyth, Q.C., Mr. Archibald, and Mr. Merivale for the Government.—This appeal is really one arising on the facts. The Begum was an independent ruler, and therefore the seizure of Badshapore cannot be enquired into by a Municipal Court. The case is nearly in all respect parallel with the *Rajah of Tanjore's* case (1). The Begum's position was that of a sovereign princess, as is forcibly shown by her own orders to her troops serving with Scindia in the Deccan (2).

(1) 7 Moore's I. A., 476.

(2) These orders were as follows:—

"Be it known to the majors, captains, ensigns, *subahdars*, *jemadars*, *havildars*, corporals, privates, artillerymen, khalashis, and to all descriptions of persons attached to my battalions now serving in the Deccan, under the immediate command of Colonel Saleur, that, on the 24th of Rajeb 1218 Hijri (10th November 1803), I arrived at the royal ghat of the Jumna leading to the city of Delhi, where, on the following day, I had the honor of an interview with the British officers, from whom I experienced all those attentions which became Chiefs in friendship and alliance with each other, and they added me as a twelfth member to their council of eleven—an event on which I congratulate all my adherents and

dependants. An engagement has been concluded between the British Government and me, by which it is stipulated that the friends and enemies of either party shall be the friends and enemies of both. It is therefore incumbent on you, if you consider yourself to be my servant and acknowledge me as your ruler, that you act in conformity to the spirit of that engagement. You will accordingly, without delay, obtain from Dowlut Rao Scindia the arrears of your pay, and having obtained your dismissal from that Chieftain, proceed to join Major-General Wellesley, the officer commanding the British army in the Deccan, when the British Government will afford you the requisite degree of protection. I shall make due allowance for your expenses, &c."

And again from the letter of the 8th March 1806 (1). The words in that letter, "propose to the Begum any modification of those terms," would not have been used if it had been in the power of the Company to insist upon modifications. If the subjects were under her rule and government, and not under that of the East India Company, the annexation of the State, so as to suppress the existing laws and to substitute new ones, would be an act of State beyond the limits of the jurisdiction of the Municipal Courts. Again the letter addressed by the Secretary to the Government in 1834 to Mr. Fraser (2) upon his attempting to check what he considered to be mal-administration on the part of the officers of the Begum, shows that the Government looked upon her as *de facto*, if not *de jure*, an independent sovereign. Under these circumstances the resuming possession of her domains at her death was an act of State; see further *Advocate-General v. Ameerschund* (3). The Regulations relied upon by the appellants were not extended to the pergunna of Badshapore until after the 20th June 1836.

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Sir R. Palmer, Q.C., in reply.

The case between the same parties called "The Arms Suit" was then heard.

This suit had also been dismissed on the ground that the Court had no jurisdiction.

It appeared that, in 1819, the Begum bought from the East India Company, for her troops, 4,000 muskets for over Rs. 1,32,000. By her will she bequeathed all guns and every description of military paraphernalia to D. O. Dyce Sombre, and she also gave them to him by the deed of gift in 1834. On her death, although the Government gave up to him all personal effects, they claimed to retain the guns, &c., on the ground that the "Begum's troops were maintained for the public service, and their equipment paid for out of the public revenue."

This claim was protested against, and the whole military stores, arms, &c., were valued at nearly five lakhs.

The case was contested below on the same grounds as the other suit.

(1) *Ante*, p. 127.

(2) *Ante*, p. 128.

(3) 1 Knapp, P. C., 329, n.

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Sir *R. Palmer*, Q.C., Mr. *Leith*, and Mr. *Doyne* for the appellants.

Mr. *Forsyth*, Q.C., Mr. *Archibald*, and Mr. *Merivale* for the respondents.

Their LORDSHIPS gave the following judgment:—

BADSHAPORE SUIT.

In this suit the representatives of the late Mr. Dyce Sombre claim to recover from the Government of India possession of a valuable estate called Pergunna Badshapore Jharsa, with mesne profits since August 1836. They do not claim merely a zemindari interest in the lands; they claim to hold them rent-free,—that is, free from assessment to Government revenue: and the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

The defence to this suit, on the part of the Government of India, is two-fold. It is alleged, first, that, on the death of the Begum Sumroo, in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an act of Government, which, having regard to the status of the Begum as an independent, or *quasi*-independent, sovereign, was an act of State, the propriety and validity whereof are not cognizable by any Municipal Court; and in support of this proposition they rely on the case of the *Rajah of Tanjore* (1), and similar authorities. It is further alleged that, if the case is cognizable by the Municipal Courts, the appellants have failed to establish by trustworthy evidence the title to this estate on a rent-free tenure, capable of passing to Mr. Dyce Sombre by the deed of gift, or subsequent will of the Begum Sumroo.

In order to test the sufficiency of the first defence, it is necessary to come to a clear conclusion touching the status of the Begum Sumroo both before and after the acquisition by the East India Company of the Doab, and the territories on the west of the Jumna, comprised in the treaty of peace concluded with Dowlat Rao Scindia on the 30th of December 1803.

(1) 7 Moore's I. A., 476.

It will be convenient to consider the question with reference to the Begum's possessions at Sirdhana and elsewhere within the Doab; because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of Badshapore, which is on the western side of the Jumna; and because the acts and powers of the Government in the resumption of Badshapore cannot be put upon higher ground, than their acts and powers in the resumption of Sirdhana.

The status of the Begum, in respect of her Doab possessions before 1803, is admitted to have been that of a *jagirdar*, holding upon a *jaidad* tenure,—i.e., upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed, when called upon, in the service of the sovereign of whom the *jagir* was held. The *de facto* sovereign of the Doab at this time was Dowlut Rao Scindia. There is nothing in the record to show what powers over the inhabitants of the district included in such a *jagir* were, as incident to the tenure, vested in the *jagirdar*. But it cannot be doubted that, practically, the whole administration of the territory included in her *jagir*, whether civil or criminal, was vested in the Begum, who exercised a sort of delegated sovereignty therein.

This being the condition of the Begum in the early part of 1803, Lord Wellesley, in pursuance of the policy by which he succeeded in detaching certain French adventurers from the service of Scindia, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta prince. War, though previously certain, was not declared until August 1803, and Lord Lake's force broke up from Cawnpore on the 7th of that month. But the earliest letter from Lord Wellesley to the Begum that is set forth in the record is dated the 20th of May. That letter shows that a previous correspondence had taken place between them, having for its object the diversion of the Begum and her battalions from the service of Scindia to that of the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the Begum's

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troops as were actually with Scindia, under her Lieut.-Colonel Saleur, from fighting against us at the battle of Assaye, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the the treaty of the 30th December 1803, the sovereignty over the Doab, and the territories west of the Jumna in which Badshapore is situate, passed from Scindia to the East India Company. The Governor-General had fully determined that the future relations of the Begum and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears from Lord Wellesley's letter to Lord Lake, of the 23rd of December 1803 (1), which admits that the Government could not in fairness establish British authority, or introduce British law, into the territory composing the Begum's Doab *jagir*; and the nature of the equivalent proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for sometime to have been in Lord Wellesley's contemplation to make the Jumna the western boundary of the purely British territory, and to form the territories conquered from Scindia on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the Begum out of the Doab, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as a sovereign under the protection of the British Government. This seems to be the fair construction of Lord Lake's letter of the 23rd November 1803 to the Governor-General (2), and of all that was done upon it. This negotiation was continued after the ratification of the treaty of the 30th December 1803, and when the sovereignty of the East India Company in the territories ceded by that treaty had become complete. The project, however, was ultimately abandoned by Lord Cornwallis; and the final treaty or agreement with the Begum was made in August 1805 (3). The

(1) *Ante*, p. 123.

(2) *Ante*, p. 123.

(3) *Ante*, p. 127.

substance of that agreement is that "those places in the Doab which have formed the *jaidads* of Zeboolnissa Begum shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacite insunt* in a *jaidad* tenure, or conditions superadded thereto. But the fair construction of the instrument, and of the correspondence which led up to it, seems to be that the Begum was, for her life, to hold her territories in the Doab from the Company, as she had held them under Scindia; and that, as she was not a sovereign princess, but a mere *jaidadar* under Scindia, she was to remain such under the Company, the project of conferring upon her the new dignity of a sovereign princess having been only part of the larger project for an exchange of territory, and abandoned with it.

Up to this time there is little, if any, express mention of Badshapore. It is, however, admitted on both sides that the Begum was *de facto* in possession of it when the cession of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of government and administration which she exercised at Sirdhana. This view of the status of the Begum is confirmed by the 9th paragraph of Lord Metcalfe's letter of the 4th May 1836 (1). The authority upon such a subject of a man of his experience and character is of the highest value.

This being so, the present case is distinguishable from that of *The Secretary of State for India v. Kamachee Boye Sahaba* (2). There the Raja of Tanjore, though he may have had less substantial power than that exercised by the Begum Sumroo, retained at least the shadow of original and independent sovereignty. Lord Kingsdown thus puts the question:—"What was the real character of the act done in this case? Was it a seizure by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State—an act not affecting to justify itself on grounds of municipal law;—or was it, in whole or in part, a possession taken by the Crown, under color of legal title, of the property of the late

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(1) *Ante*, p. 137.

(2) 7 Moore's L. A., 476.

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Raja of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up has no foundation."

The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under color of a legal title; that title being the undoubted right of the sovereign power to resume, and retain, or assess to the public revenue, all lands within its territories, upon the determination of the tenure under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would, *prima facie*, be cognizable by the Municipal Courts of India.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the powers exercised by the Begum in her *jagirs*; and the practical exclusion of her territories during her lifetime from the operation of British law and the jurisdiction of British Courts.

Their Lordships think that the Regulations, which were the written law of that part of British India, and whatever else may be held to constitute British law, were not introduced into these territories by Regulation VIII of 1805, or until after the passing of Act XVII of 1836. The Begum's territories were treated as excepted from the conquered territories: and although the sovereign rights of Scindia over these territories passed under the treaty of 1803, they passed, subject to the rights of the Begum, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the Begum's death, it was thought necessary to pass an Act of the Legislature in order to legalize the introduction of Regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords, perhaps, another argument against

treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the Begum's lifetime. It is probable, however, that the abnormal condition of these territories was one reason why the resumption took place, not, as it would have taken place in a province or district wherein the action of Government is fettered by the Regulations, by a resumption suit, but in what is called the Political Department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of State. For it is to be observed that Mr. Dyce Sombre himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the North-West Provinces, and ending with the Prime Minister; and that it was not until after his lunacy, and the order of Lord Chancellor Lyndhurst in that matter, that any recourse to the Municipal Courts was had, or apparently even contemplated.

These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an independent State. And, even if the state of the law in the territories in question at the time when the act of resumption took place, gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the Regulation Provinces, that circumstance would not exclude the jurisdiction of the Courts. For these reasons their Lordships are of opinion that the first ground of defence, being that on which the Courts below have mainly proceeded, fails.

This being so, it is next to be considered whether the appellants have established their title to Badshapore Jharsa as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands, which rent would otherwise be payable to the State.

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The original suit having been brought in 1848, to recover the estate from the East India Company, which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the appellants. This, however, would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the Regulations touching such suits cast upon the person who claims to hold land *lakhiraj*, or free from assessment to Government revenue, the burden of establishing a title recognized by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Regulation II of 1819 which the appellants, in their original pleading, invoke as one of those by which the claims of Mr. Dyce Sombre ought to have been determined in 1836, by its 28th section provides that an ancient *sanad* shall not be treated as sufficient proof of its contents on the faith of its seal, or without confirmatory evidence. And s. 3 of Regulation XIV of 1825 also shows the high degree of proof required. Nor are such provisions unreasonable; since every grant of this kind implies a perpetual alienation, in favor of some individual and his heirs, of a portion of the land revenue—the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of India,—and thus operates not only in derogation of the rights of future Governments, but to the injury of the subject, on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced.

In the plaint filed in August 1848 by the committee of Mr. Dyce Sombre, it was stated generally, and without condescending on the name of the grantee, that the *altamgha jagir* Badshapore Jharsa was originally granted by the Emperor Shah Alum, and subsequently confirmed by Madho Rao Scindia. But in the substituted plaint, which was filed in January 1864 by the appellants, and must be taken to be the

foundation of the existing suit, the statement is more specific. It is this:—"The pergunna of Jharsa, inclusive of Badshapore, was granted as an *altamgha jagir* to the Begum Sombre (or Sumroo) by His late Majesty Shah Alum, in the 30th year of the ascension; and this grant, according to the *sanad* dated the 2nd Zuffer, the 37th year of the ascension, was confirmed by the Maharaja Madho Rao Scindia." And the fourth, fifth, and sixth of the issues settled in the cause upon which the parties went to trial were:—"Whether the Pergunna of Badshapore Jharsa was granted by the Shah Alum to the Begum Sumroo, as mentioned in the plaint? Whether, if it were so granted, Shah Alum, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? And whether, if the same were granted, the grant was confirmed by Madho Rao Scindia, as in the plaint mentioned?"

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It will be convenient here to state the history and character of the alleged grant from Shah Alum, as disclosed by the documents upon which the appellants mainly rely, viz., the papers procured from Delhi.

The case which the Counsel for the appellants make on these documents is, first, that in the month of Shuwall, in the 30th year of Shah Alum, the Begum presented a petition, praying that a new and complete *altamgha sanad* of Pergunna Jharsa might be granted to her in substitution for one previously granted to Zuffer Yab Khan, the son of Sombre or Sumroo; secondly, that a report was made, recapitulating the prior devolution of the estate, showing that it had been held by certain great officers of the Court of Delhi in succession, as part of their respective *jagirs*, that it had for some time "continued released" as *jaidad* of the battalion of Sumroo Bahadoor Feringee, and, on the 15th of Rajeb of that year, (with the exception of certain villages) had been granted in *altamgha* to Zuffer Yab Khan, on a representation that an *altamgha sanad* under the seal of Maharaja Puttail (said in one part of the record to be a title of Scindia) had been lost; thirdly, that on this report and on the 19th of Shuwall, the King issued a *firman* to the effect that an *altamgha* grant of Badshapore Jharsa, with the exception of the villages excepted from the grant to Zuffer Yab Khan,

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should be made to the Begum on the terms therein expressed ; fourthly, that whether the formal grant or *sanad* was or was not issued to her in pursuance of that *firman*, she; two months afterwards, presented another petition, in which she made no reference to the preceding grant to Zuffer Yab Khan, but stated that all the estate, including the excepted villages, had, since the death of Sumroo, been in her possession as *jaidad* ; and that in consequence of that petition, a *sanad* of the whole estate, including the villages before excepted, was granted to her in *altamgha* under the khas seal and golden *togra* of the Emperor on the 9th of Zilhij in the 30th year of his reign.

If these facts are true, it follows that until the month of Shúwall, or that of Zilhij, in the 30th year of Shah Alum, whatever interest the Begum had in Badshapore was in the nature of a *jaidad* tenure; that Zuffer Yab Khan never had an *altamgha* grant of that estate under a *sanad* of the Emperor, except for a period of, at most, three months ; and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies, or alleged copies, produced in evidence are admitted to have had no existence before 1847. They are said to have been then copied from old records at Delhi at the instance of the committee of Mr. Dyce Sombre, or his legal advisers, with a view to the proceedings being commenced in the following year. If the transactions which they represent to have taken place really took place, an original *sanad*, in the terms of what in the record is called "*sanad* No. 3" (1), must have been issued to the Begum Sumroo under the seal of Shah Alum. But of this original *sanad* there is no trace. It is not produced: its loss is not accounted for: there is no evidence that anybody ever saw it.

It has been strongly argued for the Government that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the Courts of that country, in rejecting a copy in the absence of

(1) *Ante*, p. 141.

the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced, has no application to Courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This Committee undoubtedly enforced the rule in the case of *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (1). There have, however, been other cases in which their Lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials at *nisi prius*. And, considering that in this case the Judge of first instance has commented on the copies in question, their Lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the appellants' title, the absence of proof that the original *sanad* once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the *sanad*, put forward by the learned Counsel for the appellants, is that they are proved to be copies taken from ancient documents at Delhi, since destroyed in the mutiny, which, whilst they existed, were public records, and of the same value as a duplicate original of the missing *sanad*.

But what is the evidence as to these papers? The proof of the most important of them, that called *sanad* No. 3, depends on the testimony of the witness, Balmokund, given in 1865. He has deposed that, in 1847, he was ordered, by the then Peshkar of the King of Delhi, to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are:—"It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by him in his *busta*, or record cloth." He goes on to say:—"There had been countless papers in the charge of his (the Peshkar's) forefathers; many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those

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(1) 3 Moore's I. A., 156.

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old papers or records which had come down from his forefathers into his actual possession." In answer to the inquiry, what had become of the paper from which he made the copy, he said:—"The Peshkar died in 1850, and all trace of his documents has disappeared;" and added that the different servants of the King had each in their possession a few pounds' weight of documents that had been handed down from father to son, besides those relating to their own time. He had previously said, when asked whether he lived in the Peshkar's house, "no; I went there for business; after the taking of Delhi by the British" (which words, as the Peshkar died in 1850, must be taken to refer to the original introduction of British authority in Delhi, rather than to the taking of the city in 1857), "the *duftur* (registry office) of the King hardly existed." Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of Delhi, if full credit be given to the witness and to his means of knowledge. It came to the Peshkar with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their Lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorized registry by a responsible officer. The evidence of Chujo Singh, as to the other and less important paper, is of the same character.

An attempt was made to cast further suspicion on these copies, and the transactions which they are produced to prove, by the dates. It is contended on the part of the respondents, that the months of Shuwall and Zilhij of the 30th year of Shah Alum fall within the autumn of 1788, when he was a helpless prisoner in the hands of Gholam Khadir, the Rohilla, who put out his eyes. On the other hand, the appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the respondents' contention. It seems to be certain that Shah Alum's reign, notwithstanding a short interregnum, was calculated from the death of his father Alamgir II, which Mr. Elphinstone and the best historians fix in November 1759, corresponding with Rabi II, A.H. 1173.

It follows that the *jalus* or accession of Shah Alum is correctly fixed by Mr. Prinsep in his tables as 1 Jumadi I, A.H. 1173; and if the 30th year of that prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 Jumadi I, A.H. 1202, and end with the 1 Jumadi I, A.H. 1203. The months of Shuwall and Zilhij of the 30th year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the appellants have referred to some coins and seals, from which it would appear that the 30th year of Shah Alum's reign was treated as identical with A.H. 1203; and from this, and a passage in Mr. Seton's letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may perhaps be capable of being reconciled with the date of Shah Alum's accession by some peculiar mode of calculating the *jalus* year; and their Lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that, even if the dates in question are taken to fall within the year 1789, there is reason to doubt whether Shah Alum was at that time in a condition effectually to alienate any part of the revenues of the territories within which Badshapore is situated, at least, without the concurrence of Scindia; and that there is no suggestion that the alleged grant received the sanction of the Mahratta power until 1795.

Their Lordships, considering the nature of the documents under consideration, and the testimony by which they are supported, have come to the conclusion that the appellants have not given evidence which can be accepted as sufficient proof of a grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind: it was argued that copies of certain *sanads*, showing his title to Badshapore, were proved to have been sent by Mr. Dyce Sombre in 1836 to the officers of Government; that these were not shown to have been returned by the Government, and have not been produced by them in this suit; that they must therefore be

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assumed to have been identical, or, at all events, not inconsistent with the documents subsequently procured from Delhi. It was further insisted that, inasmuch as Government did not question the genuineness of these *sanads* in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of *sanads* supposed to have been sent by Mr. Dyce Sombre after the Begum's death. It is hardly pretended that the Government ever received from her any document of title except a copy of Scindia's *perwanna*. The *sanads* sent to Mr. Fraser, whatever they may have been, were returned by her messenger. Mr. Forsyth, on the other hand, argued strongly that Government was not shown to have received from Mr. Dyce Sombre copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except Scindia's *perwanna*. The evidence on the point is as follows:—

Mr. Dyce Sombre, writing in the beginning of March 1836 to Mr. Hamilton, says:—"I beg to say I have already forwarded to you the copies of the *sanads*, by which Her late Highness held her *jaidad*, and the pergunna of Badshapore in *altamgha*, assigned to her by the former rulers of Hindustan, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to Badshapore but a copy of Scindia's *perwanna*, previously called by the Begum, in her letter of 1832, a *sanad*, had been sent. And Mr. Hamilton, writing to Mr. Hutchinson, says:—"I also annex a copy of the *sanad* referring to Badshapore," having in the preceding sentence spoken of the *sanads* relating to Sirdhana. The argument that he would not have applied the word *sanad* to the *perwanna* does not appear conclusive. Their Lordships can give no credit to the alleged copy of the letter set out at p. 29 (1). It was hardly pressed by Sir Roundell Palmer in reply. But Mr. Hamilton's letters of the 20th May 1836 (2), and of December 1836 (3), have been strongly relied upon by the appellants. They were written by him as Collector of Meerut, with the object of having applied to the back rents of Sirdhana, which was within his jurisdiction, a

(1) *Ante*, p. 136.

(2) *Ante*, p. 137.

(3) *Ante*, p. 137.

more stringent rule than that which his superiors were disposed to apply either to Sirdhana, or to Badshapore (with which he had no official connexion). He draws a distinction between the two tenures, treating Sirdhana as *jaidad*, and Badshapore, whether resumable or not, as the Begum's personal *jagir*. That this was the nature of the Begum's claim would perhaps appear from the copy of Scindia's *perwana*; but it must be admitted that these letters are, on the whole, more consistent with the appellants' than with the respondent's theory, concerning the number and nature of the documents sent by Mr. Dyce Sombre.

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One great and unexplained difficulty, however, touching the copies of *sanads* supposed to have been sent by Mr. Dyce Sombre is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the bar that he must be presumed to have retained copies of whatever he sent), what became of those copies? Mr. Dyce Sombre was in correspondence with the home authorities touching his claim up to 1842. He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th of July 1843, and Mr. Larkins was appointed his committee in 1844. There was a faint suggestion at the bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the suit affords grounds for supposing that neither Mr. Dyce Sombre, between 1836 and 1842, nor Mr. Larkins, when he took the advice of Counsel in 1847, had any copies of the alleged *sanads* from Shah Alum: and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from Delhi in 1847.

Their Lordships are of opinion that, even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted, its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was that the tenure was, either in its nature, or by

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arrangement, resumable on the Begum's death; and they resumed it when that event happened.

The appellants' case, however, presents still graver difficulties. When a doubtful title is in dispute, the first question that suggests itself is, when was it first asserted; and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the Begum in her lifetime, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having existed. The following is the short summary of the correspondence of the Begum in her lifetime with the Government, touching Badshapore.

The first mention in the printed correspondence of any special title to the pergunna is to be found in Mr. Seton's letter of the 24th February 1808, when he complains of the attempt of the Begum on the 25th of November 1807, to obtain from the King of Delhi a new *firman*, granting this pergunna as an *inam altamgha* to Mr. George Dyce (the father of Mr. Dyce Sombre) and his descendants (1). Mr. Seton's statement as to the property is that it was bestowed as a *jagir* (which may be a mere estate for life) by Shah Alum in the thirtieth year of his reign, which he treats as corresponding to 1789 A.D. upon Zuffer Yab Khan; that the Begum had obtained possession of it in that person's lifetime, and retained such possession after his death; and had now obtained a new *firman* bestowing Pergunna Jharsa and the town of Badshapore, formerly the *jagir* of Zuffer Yab Khan, as an *altamgha* upon Mr. George Dyce and his descendants. The Government of the day objected to this proceeding; insisted that Badshapore, like the Begum's possessions in the Doab, would revert to the East India Company on her death; and was obviously determined not to recognize as valid any grants of that nature which might be made at that date by the King of Delhi; but recommended that, in deference to the King and to her, she should be induced by friendly negotiation to give up the new *sanad*. The negotiations for this purpose

(1) *Ante*, p. 129.

went on till 1811, when the Begum did give up the new *sanad*. But the important fact in this transaction is that the case she then put forward (by her letter of the 16th of February 1811) was the following:—"I had, as I still retain, a firm conviction in my own mind that the pergunna of Badshapore and the villages of Bhogeeppoor and Bhutgong were held as *altamgha* to my late son, and would consequently revert to my adopted son, George Alexander David Dyce, in virtue of his marriage with my granddaughter. On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but," &c. (1). This letter contains most important admissions, which are utterly fatal to the title set up in the amended plaint. It shows that at that time no grant could be found; furthermore, it asserts "the firm conviction" in the Begum's mind that Badshapore was held as *altamgha* to her late son, but that, in consequence of doubts respecting the nature of the grant, which could not be found in the family records, she could not urge "a positive right." Now it is inconceivable that, if she had obtained a grant to herself from Shah Alum, she should not, at this date (1811), have remembered it, and remembering it, should not have put it forward; and if such a grant ever had existence, and could not then be found among her family records, what reason can be suggested why she should not then have applied to the registry of the King at Delhi for a copy of it? In 1825, after an interval of fourteen years, she proposed to surrender the *jagirs* held by her, including Badshapore, a proposal which was never carried into effect. She seems to have then made no statement of her title: but the representation of Colonel Dyce, with whom she was then on bad terms, was that the *sanad* on which the *jagir* was held, whatever its effect, was in favor of Zuffer Yab Khan. Had the Begum at that time been in possession of *sanads* in her own favor, superseding the grant to Zuffer Yab Khan, she would hardly have failed to produce them. In 1831 she first expressed a desire that her *jagirs* should be assigned to Mr. Dyce

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Sombre, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of Badshapore and its dependent villages as property "which the deceased Nawab, his grandfather; was possessed of on *altamgha* tenure" (1). The Government, then as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Sometime in 1832, as it is supposed, she made a further application to Government by the letter, of which the substance is set forth in the record (2). This letter is the only one which can be taken to contain the assertion of an *altamgha* title to Badshapore in herself. She speaks of the estate as "my *altamgha*;" and forwards with some other documents a copy of Scindia's *perwanna*. But even in this letter, when combating the supposed objection of Government that Badshapore was included in the arrangement made with her, through Mr. Guthrie, she says:—"I beg to observe that the country of the Doab only is mentioned in it (Mr. Guthrie's letter); while the pergunna of Badshapore, *alias* Jharsa, my *altamgha*, and the gardens, &c., were bestowed on Nawab Zuffer Yab Khan, the maternal grandfather of Mr. Dyce, for his expenses." This sentence would imply that the title was that of Zuffer Yab Khan, though the *de facto* possession was hers. In March 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. Dyce Sombre. The Government again refused to give its consent, treating the estate as held on a lifetenure only. But, on this occasion, the Begum once more clearly rested her claim upon an alleged *altamgha* grant to Nawab Zuffer Yab Khan; and referred to *sanads* importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favor (3).

The discussions, therefore, between the Government and the Begum touching Badshapore and the tenure on which it was held, cover a period from 1808 to 1833. The Government, throughout that period, insisted that her interest was limited to

(1) *Ante*, p. 133.

(2) *Ante*, p. 133.

(3) *Ante*, p. 133.

her life, and that, on her death, the estate would revert to the State. The Begum, on three or four several occasions, at considerable intervals of time, contended that the tenure was *altamgha*; sometimes appealed to the Government to continue it after her death as a matter of favor; sometimes attempted to raise a claim as of right; but on every occasion, except, perhaps, in her ambiguous letter in 1832, rested on the alleged grant to the son of Sumroo, and never pretended that that grant had been superseded by the *sanads* in her own favor, on which the appellants now rely. Her letters, moreover, point to a substantial grant of the estate to Zuffer Yab Khan in *altamgha*, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the Delhi document, viz., that the *altamgha* grant to him endured only three months, and was never perfected by possession. The correspondence also concerning the pensions, and the negotiations she entered into on that subject, are wholly inconsistent with the theory that she held, or claimed to hold, Badshapore in *altamgha* by a valid grant to herself.

Sir Roundell Palmer endeavoured to meet the strong presumption which this continued course of conduct, and these repeated representations on the part of the Begum, raise against the validity of the alleged *sanads*, by an ingenious theory that she may have conceived that claims founded on an alleged grant to Nawab Zuffer Yab Khan would be more likely to find favor with Government, than one founded on *sanads* in her own favor; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an *altamgha jagir* had been granted to Nawab Zuffer Yab Khan, the Begum had virtually usurped his rights before the cession of the territories west of the Jumna by Scindia to the East India Company. The British Government would in no way be bound, and certainly would be little disposed, to recognize a title which had been *de facto* defeated before the territories in question were ceded to them;—they would be less inclined to recognize it, if the title of Zuffer Yab Khan had been of so flimsy a character, and short duration, as the

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case now made represents it to have been—and had been *de jure* superseded by a grant to the Begum in 1789. If the case of the appellants is true, these circumstances might easily have been ascertained by enquiry through the British officers at Delhi. Again, the Begum could not make title to the estate through the son of Sumroo. In seeking to transmit the estate to Dyce Sombre, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid *sanads* from Shah Alum, that she should put forward and rely on that title, than that she should rest on the old grant to Sumroo's son, which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of Delhi a *sanad*, little likely to be recognized by the British Government, and founded on the alleged title of Zuffer Yab Khan, when, if the present case be true, that title had been already superseded by a valid *sanad* in her own favor. If the validity of the documents on which the appellants now rely were supported by strong and independent evidence, it might be reasonable to endeavour to account for the Begum's silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir Roundell Palmer. But if, as has been shown, the direct evidence in favor of the documents is weak and suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is, what effect is to be given to the *perwanna* alleged to be Scindia's confirmation of the *sanads*? Can it be taken to supply the deficiency in the proof of the *sanads*, and to establish, or corroborate, the title of the Begum? It is known to have existed in the Begum's lifetime, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by Madho Rao Scindia. But the evidence proves that, at its date, Madho Rao Scindia was dead. If, as it has been contended on behalf of the appellants, the confirmation pleaded is to be taken as a confirmation by Dowlut Rao Scindia, the difficulty arises that the document bears the

seal of his then deceased predecessor. There was no proof that this seal was adopted and used by Dowlut Rao Scindia, but it was attempted to get over the difficulty by a reference to the case of *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (1). In that case there was evidence that the seal of the deceased zemindar had in several instances, other than that in question, been used after his death. Here there is no proof that Dowlut Rao ever in any other instance used the seal of his predecessor; it is highly improbable that he should do so: and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shown in one case to have prevailed in the cutcherry of a Bengal zemindar, it may be inferred in another that the same practice prevailed in the durbar of a powerful sovereign prince. Their Lordships, therefore, cannot treat the alleged confirmation of the Begum's title by the Mahratta prince, in 1795, as established.

Weighing, then, the direct evidence in favor of the *sanads*, weak and suspicious as it is, against the presumptions arising from the non-production of the original *sanad*, and the failure to account for it; and against the still stronger presumptions arising from the acts, representations, and conduct of the Begum in her lifetime, their Lordships have come to the conclusion that the appellants have failed to establish the title which they have set up. To decree in favor of a title to an hereditary and transmissible *lakhiraj* estate, on evidence so untrustworthy, would be contrary to the long-established practice of the Courts in India; and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which, in their Lordships' opinion, are to be regretted. It is particularly to be regretted that the Government did not, in some way or another, investigate the title of Mr. Dyce Sombre, in 1836, as a question of right, instead of dealing with it by an act of power. It is to be regretted that, in 1849, they did not fairly try the question of title, instead of meeting it by a plea of the statute of limitations. But after the fullest consideration of the case, and with every desire to give to the appellants

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(1) 10 Moore's I. A., 192.

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the benefit of any inference which may be legitimately drawn from the circumstances of this protracted litigation, their Lordships see no grounds for believing that, if the cause had been tried in 1836, as an ordinary resumption suit, under the Regulations, Mr. Dyce Sombre would not equally have failed to show a good title to an *altamgha* tenure in the Begum. If it were necessary for their Lordships to express an opinion of the nature of the Begum's interest in Badshapore, they would incline to the opinion that her persistent statement of there having been some grant to Zuffer Yab Khan was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal, it is sufficient to say that the appellants have, in their Lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and, therefore, to establish the title pleaded by them; and their Lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed, and the decrees of the Indian Courts affirmed; and their Lordships will advise Her Majesty accordingly.

ARMS SUIT.

In "The Arms Suit," their Lordships are of opinion, for the reasons already given in the Badshapore suit, that the seizure of those arms and stores was not an act of State, but an act done under a supposed legal right, on the resumption of the *jaidad* upon the Begum's death. They think that the evidence shows that the arms and stores were purchased by the Begum, and that there is no authority or evidence to show that those who hold by *jaidad* are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next *jaidadar* would be bound to provide arms by virtue of his tenure.

Their Lordships think the decree in this suit should declare the appellant entitled to recover from the Government of India

the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators in this country the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to India, with instructions to the Court there to ascertain such value, and give a decree accordingly. Her Majesty's order on this appeal, may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in India of each suit will follow the result; and their Lordships think that each party should bear their own costs of these appeals.

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Appeal in the Badshapore suit dismissed.

Appeal in the Arms suit allowed.

Agent for appellants: Mr. *Wilson*.

Agents for respondents: Messrs. *Lawford and Waterhouse*.

RAJA SALIGRAM AND OTHERS (PLAINTIFFS) v. THE SECRETARY
OF STATE FOR INDIA IN COUNCIL (DEFENDANT).

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August 2.

[On appeal from the Chief Court of the Punjab.]

*Forfeiture—Confiscation—Act of State—Jurisdiction—Circular Orders—
24 & 25 Vict., c. 67—Indian Councils Act, 1861.*

The status of the King of Delhi was that of a king recognized by the British Government; and the confiscation of his territories in 1857 was an act of State, and not an act done under color of any legal right of which a Municipal Court could take cognizance. His tenure of the territories assigned him by the Government was a tenure merely *durante regno*, and no power was conferred upon him of creating incumbrances which would survive his deposition.

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE JAMES, SIR BARNES PEACOCK, LORD JUSTICE MELLISH, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEELE.

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The word "confiscation" does not necessarily import that the appropriation is to be made as a penalty for a crime, nor when used in that sense does it necessarily imply that the forfeiture has accrued upon conviction, but it may also be properly used as applicable to appropriations of property by Government as an act of State.

The Circular Orders, as to the liability of Government for debts of rebels, issued by the Judicial Commissioners of the Punjab, were not laws within the meaning of 24 & 25 Vict., c. 67.

The cases of *Forester v. The Secretary of State* (1) and *Lalla Narain Doss v. The Estate of the ex-King of Delhi* (2) distinguished.

THIS was an appeal from a judgment of the Chief Court of the Punjab, dated the 14th February 1867, given in favor of the respondent, and confirming two previous judgments of the Assistant Commissioner and the Commissioner of Delhi, dated respectively the 24th July 1865 and the 15th January 1866.

The suit was brought by Saligram and Devi Singh for the payment of a debt alleged to be secured on certain rent-free lands and other real property mortgaged to them by the ex-King of Delhi, and now in the possession of the Secretary of State for India in Council in trust for the Crown.

The facts of the case were briefly as follows:—On the expulsion of the Mahratta from Upper Hindustan in 1803, the British Government granted certain lands, known as the "Assigned Territories," for the support of the kings of Delhi. In "Notes of Instructions" to the Resident at Delhi, dated the 17th November 1804, providing for the administration of these territories, the Governor-General wrote:—

"The Governor-General does not deem it advisable to enter into any written engagement whatever with His Majesty, nor is it His Excellency's intention to solicit any concession, nor to interdict or oppose any of those outward forms of sovereignty to which His Majesty has been accustomed. His Excellency is desirous of leaving His Majesty in unmolested exercise of all his usual privileges and prerogatives."

In a letter dated the 23rd May 1805, the Secretary to Government, writing to the Resident at Delhi, set forth certain provisions made for the King; amongst others, that "His Excellency in Council has been pleased to determine that the

(1) *Ante*, p. 120.

(2) 11 Moore's I. A., 277.

territory to be assigned to the royal family shall remain under charge of the Resident at Delhi, and that the revenue shall be collected, and justice be administered, in the name of His Majesty, and under Regulations to be prescribed by the authority of the British Government;" and the Governor-General, in communicating these arrangements to the Court of Directors, spoke of the "throne of Delhi" being "placed under the protection of the Honorable Company." Under these arrangements the King continued to retain all the outward marks of royalty. Within the precincts of the Delhi palace he exercised nominal authority as a sovereign, and was exempt from the jurisdiction of the ordinary Courts of Law; the administration of the assigned territories beyond those precincts being conducted by British functionaries under the order of their Government.

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On the 7th October 1841, the following rules were issued by the Government with reference to the King:—

i. "The administration of civil and criminal justice within the precincts of the royal palace at Delhi is under the care and control of His Majesty, who in all important cases advises with the Resident or Political Agent at his durbar. The ordinary tribunals, established by the British Government for the provinces of Hindustan, have no jurisdiction or authority therein. The Courts will regard the royal palace, in respect to all events that occur, and all persons who reside therein, as they would regard a foreign and independent territory.

ii. "The residents of the palace become amenable in their persons to the established Courts of Civil and Criminal Justice on leaving the precincts of the palace. The following persons are excepted from the operation of this rule.

iii. "The emperor and the heir-apparent are exempted in their persons from all civil and criminal process. The sons and brothers of the reigning, or any former, emperor are exempt in their persons from the process of the Civil, but not of the Criminal, Courts. The process of the Criminal Courts shall be served on them through the Lieutenant-Governor's Agent at Delhi, who will pay due regard to the rank and circumstances of the parties in communicating the said process.

iv. "All civil suits regarding property lying beyond the precincts of the palace, and otherwise cognizable by the established Courts, to which the privileged persons named in the preceding rule may be.

1872 parties, shall be instituted or defended by the Lieutenant-Governor's Agent on their behalf.
 RAJA v. "His Majesty the reigning King of Delhi has only a life-interest
 SALIGRAM in the royal domain. His Majesty is the judge of the effect to be given
 v. to royal grants made by himself, or by his predecessors, of any part of
 THE such domains. Parties possessing claims founded on such grants shall
 SECRETARY OF prefer their application for the gracious consideration of their case to
 STATE His Majesty at Delhi, either direct or through the Lieutenant-Governor's Agent, but shall not be able to bring them before the ordinary Courts of Justice. Decisions thus passed by His Majesty will be respected and enforced by the civil authorities. All other claims, either against His Majesty or his grantees or agents, shall be heard in the Courts and decided as ordinary cases.

vi. "All process in cases cognizable under these rules by the Civil or Criminal Courts on persons resident in the palace shall be served through the Lieutenant-Governor's Agent."

At this period the King of Delhi became indebted to the plaintiffs, who were bankers and shroffs, carrying on business in that place, and in the years 1845, 1846, 1847, and 1851, respectively, as security for loans from them, executed certain instruments in their favor.

On each of these instruments were endorsed the various payments which were made under the signature of the Resident, who made the payments periodically from the income of the properties. The first two instruments were formal deeds of mortgage; the last two, only *shukhas*, or royal letters, but by an arrangement with the Lieutenant-Governor's Agent, that officer collected the revenue of the lands specified in the *shukhas*, which were treated as hypothecating the particular lands so specified. By this arrangement these lands included Mauza Ruboopoora, and other villages forming part of the assigned territories. The last payment made under them was in 1855, after which date the King appears to have refused to allow the Commissioner to make any further payments, nor did the plaintiffs sue him. In May 1857, the King resumed the management of his own affairs, and the Lieutenant-Governor's Agent ceased to collect the revenue, and to be in any way responsible in the matter. On the 18th of September in that year, after the mutiny, the King was captured by the British Government

and made a prisoner of war, having been for some time the nominal head of the insurgents in Delhi.

On the 3rd of October 1857, the Commissioner of Delhi, in behalf of the Government, seized and took possession of his lands in accordance with the following order:—

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“The confiscation of all Crown lands (*tayul-i-shahi*), villages, lands, gardens, &c., and of all the *jagirs* of sultans, begums, &c., having been deemed proper, it is ordered that perwannas be issued to the tehsildars of the south, north, and east, to confiscate all the villages and lands above specified, and also to confiscate any other village, lands, gardens, &c., of the above description not mentioned in the accompanying list; and that they should submit a statement of the extent of area and the amount of jumma and quality of land. A copy of this proceeding to be forwarded to the Collectors of the districts of Paneeput, Goorgaon, Rohtuck, Hissar, and Sirsa, with a view to the confiscation being carried out. A copy of this proceeding to be forwarded to the Commissioner of Meerut districts, with a view to orders being issued by him for the confiscation of any village, lands, &c., that may be situated in his districts.”

The work of the Criminal and Civil Courts, suspended during the disturbance, was resumed; in the case of the former from the commencement of October 1857, in that of the latter not until the 1st July 1858, and the city of Delhi continued for some months under military government.

In pursuance of the order of the 3rd October 1859, as was admitted by the plaintiffs themselves, all the property involved in the present suit was seized, and taken possession of, by the servants of the British Government before the end of the year.

The plaintiffs, Saliqram and Devi Singh, were concerned in the rebellion. For this offence they were tried and convicted, and punished with a fine of Rs. 10,000 each.

No investigation into private claims against estates confiscated under the special Acts of 1857, occurred before 1859. On the 4th February of that year, the Lieutenant-Governor considering that such claims should be registered and enquired into, the Secretary of the Punjab Government wrote to the Government of India, with reference to the debts of the Nawabs of Jhuggur and Dadree, in the Delhi territory, who were described as lately chiefs exercising sovereign powers, whose territory

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it was said had escheated to the British Government on account of their defection. The Lieutenant-Governor had expressed it as his personal opinion that—

“On the general question of the liability of a confiscated estate exempt from revenue for *bonâ fide* debts contracted by its rebel owner, whilst under ordinary circumstances the successors to a *jagir* was not liable for the debts of his predecessors, still it was to be held that, where a *jagir* reverted, by confiscation, to Government, common rules did not apply; and that the interests of justice required the protection of creditors from a political catastrophe which they could not have foreseen.”

On the 9th of August, the Secretary to the Government of India answered:—

“I am directed to state that the Governor-General in Council agrees with the Lieutenant-Governor as to the particular cases under consideration. As to the general rule His Excellency considers that all debts contracted upon the security of the estate confiscated should be paid, but he would leave all other debts, such as ordinary personal and contract debts, to be dealt with according to the circumstances of each case. There is no reason why, in the case of prodigality and extravagance on the part of one who has become a rebel, the State should suffer, or why his creditors should benefit by his having rebelled.”

In a later letter it was intimated that the Government could not “concur in the opinion of the Lieutenant-Governor in its extreme latitude.” “All debts secured by mortgage,” wrote the Secretary, “are to be paid, provided, of course, that they are just and properly supported, and have been contracted prior to the act of rebellion, and with no view to its commission.” On the 9th of September 1859, the Judicial Commissioner forwarded this correspondence “for the guidance of his subordinates,” and on the same day he issued a “Circular Order” (No. 112 of 1859), which stated that the Judicial Commissioner forwarded the letters, above alluded to, for the information and guidance of officials, on the question of the liability of Government for the debts of rebels, whose estates had been confiscated for rebellion. In 1860, the plaintiffs applied for payment of the present claim to the Commissioner of the Delhi Division, and the application was by him referred to the Judicial Commissioner of the Punjab on the 18th June. In a letter of that,

date, he expressed it as his opinion that the payment of any such debts, in accordance with the directions of the Governor-General, must be treated as a matter of favor, to which convicted rebels could not be entitled, and, further, that a distinction was to be made in the present case, between the "rent-free villages," and the rest of the mortgaged property, as the former would be classed with "personal debts." In support of this latter view, he cited a decision of the 7th September 1859, by which certain claims had been rejected, which were preferred on the purchase and mortgage of certain *istemrari* tenures in Goorgaon, the confiscated property of outlawed rebels. And he mentioned that on the 19th May 1859, the Revenue Sudder Board of the North-Western Provinces had held that "the *mafi* privilege in *tayul* lands ceased with the confiscation, and the lien with it." The Judicial Commissioner of the Punjab expressed his opinion that as much of the claim as could be proved should be made good by Government; and the matter was laid before the Government of India, who, on the 28th of December, 1860, replied to this effect:—

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"3. Of the claims now advanced, the Commissioner of Delhi has put forward as an instance that of Saligram and Devi Singh, who were convicted as rebels, and punished with a fine of Rs. 10,000 each. Their claim amounts to Rs. 90,000, and is described as the principal and interest due on a mortgage of certain rent-free villages, and other real property, once belonging to the ex-King.

"4. It was ruled in 1858 that the successor to a *jagir* shall not be liable for debts incurred by his predecessor, if he refuses to become responsible for them, and foregoes all claim to the real or personal property which the deceased may have possessed independently of the *jagir*. But in the case of the Nawab of Dadree, whose *jagir* was confiscated and granted in perpetuity to the Raja of Jheend, and in other similar cases, the Government admitted the principle that the creditors should be protected 'from the effects of a political catastrophe which they could not have foreseen.'

"5. It appears to His Excellency the Governor-General that a distinction may be drawn very properly, and consistently with the principles which have been laid down, between loyal creditors and those who took part in the rebellion.

"6. The general rule is that rent-free estates, secured by grants from

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Government, are not liable for the debts of the deceased grantees. The exception is in the case of such estates which have been confiscated; and this exception is based on the consideration, that 'the interests of justice require the protection of creditors from the effects of a political catastrophe which they could not have foreseen.' But creditors, who, like Saligram and Devi Singh, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that, which can be claimed only as a favor; for it is in the essence of a concession by favor, that it should be withheld where favor is not due.

"7. The Governor-General is of opinion that neither Saligram and Devi Singh's claim, nor that of any other creditor of the ex-King who has been convicted of rebellion, to the liquidation of their debts from the revenue of the Crown lands should be admitted."

In accordance with the opinion expressed in this letter, a second Circular Order (No. 5 of 1861), dated 12th January 1861, enclosing that further correspondence, was issued to the same authorities as the previous one, it being expressly stated to be in continuation of the former Circular.

On the 28th of November 1864, the plaintiffs Saligram and Devi Singh, having been paid nothing under the mortgage since 1855, commenced the action out of which this appeal arose in the Court of the Assistant Commissioner of Delhi. Their claim was for Rs. 68,853-7-2, principal and interest. The plaint was based upon the Circular of 1859:—"The defendant," it set forth, "owing to the late mutiny, confiscated all the landed estates of the late King; but by a Circular No. 112 of the Judicial Commissioner of these provinces, under the orders of the Supreme Government, all mortgages effected by the late King on these estates which the defendant has confiscated are to be paid."

The material defences raised by the defendant were, 1st, that the property alleged to have been mortgaged to the plaintiffs, with all rights and interests in it, was seized by the defendant on behalf of the British Crown on political grounds as an act of State, and consequently no claim against the defendant

for so taking possession was cognizable by any Municipal Court; the 2nd was to the same effect, but stated that the seizure was "during the continuance and in the prosecution of war." The 5th and 6th were in the following terms:—

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"5. That the Circular No. 112, on which the plaintiffs grounded their right to demand from defendant the debts they sued for, was simply a private order addressed by one officer of Government in his executive capacity to others, directing them, as a matter of mere grace and favor, to relax in certain cases, where they would have operated hardly, the laws under which Government was free from legal liability in respect of debts secured on the Delhi Crown property, and certain other property, which had come into its possession as a consequence of the rebellion and war of 1857; and that the issuing of such an order could be of no effect whatever to bind the Government as defendant in a Municipal Court.

"6. That the said Circular did not authorize the exercise of this grace and favor in respect of the debts claimed by the plaintiffs, as was clear from the wording of the said Circular, and as was further clear from the Circular 5 of 1861."

Several issues were raised, of which the 1st, 4th, 5th, and 6th were as follow:—

"1. Was the seizure of these properties by Government such an act of State, or act of war, as is not cognizable by a Municipal Court?

"4. Has the Circular in question the force of a legislative enactment?

"5. Do the Circulars issued by the Judicial Commissioner of the Punjab in his executive capacity bind the Courts of the Punjab or not?

"6. Does Circular 112 apply to the debts claimed by the plaintiff?"

Other issues were raised as to the effect of Act IX of 1859 and Act XXXIV of 1860, which, however, were not insisted on by the defendant's counsel in the argument before Privy Council.

The Assistant Commissioner gave judgment in favor of the Government on the 24th July 1865. On the question whether

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the seizure was an act of State, he entered at length into the *Tanjore* case (1), and the parallel it presented, and referred also to the decision of the Privy Council in the case of *The East India Company v. Syed Ally* (2), in confirmation of the opinion he deduced from that parallel, that the seizure was, and must be, considered as an act of that description. He also held that the seizure was an act of war, over which, by an established principle of law, no Municipal Court could claim jurisdiction.

The plaintiffs appealed to the Commissioner of Delhi, who, on the 15th January 1866, confirmed the previous judgment.

The plaintiffs then appealed to the Chief Court of the Punjab, and on the 14th February 1867, that Court (Boulnois and Roberts, JJ.) gave judgment dismissing the appeal. Boulnois, J., referred to the cases of *Le Caux v. Eden* (3), *Elphinstone v. Bedree Chund* (4), and *Kamachee Bhai Sahaba v. The Secretary of State* (5), and held that the seizure of the mortgaged lands was an act of State, on political grounds, during the continuance and in prosecution of war, and that, consequently, no claim against those whom the defendant represented, on account of their having taken possession of this property, was maintainable in any Municipal Court immediately after the seizure. He further held that there was nothing to show that there was any intention to make a rule, law or regulation by the Circular Order 112 of 1859; but that even if that order acquired the force of law by the operation of the Indian Councils Act, 1861, and the plaintiffs' claim was within the words of that order, it was nevertheless expressly excluded by the order of 28th December 1860. Finally he was of opinion that the case was governed by the principle on which *Veer Rajender Wadeer v. East India Company* (6) was decided; that Courts of Law cannot take cognizance of acts of power exercised by Government in matters of State arising out of war.

Roberts, J., gave judgment to the same effect, citing, in addition to the cases referred to by Boulnois, J., the cases of

(1) 7 Moore's I. A., 476.

(2) *Id.*, 555.

(3) Doug., 59.

(4) 1 Knapp, P. C., 316.

(5) 7 Moore's I. A., 476; 537.

(6) 30 L. J., Ch., 226.

Wagentreiber v. The Secretary of State (1) and *Lindo v. Rodney* (2).

From these several decisions the plaintiffs appealed to Her Majesty in Council.

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Mr. *Kay*, Q.C., and Mr. *Bush Cooper* for the appellants.—The appellants are *bonâ fide* incumbrancers created by the King long before forfeiture. Even admitting for argument's sake the confiscation to be an act of State, it could not affect the plaintiffs' rights as mortgagees. The British authorities gave the King estates to be dealt with at his will and pleasure, and all charges created by him survived his deposition. *Forester v. The Secretary of State for India* (3) and *Lalla Narain Doss v. The Estate of the ex-King of Delhi* (4) are in point. There is a difference between forfeiture and escheat. Where a man's property is forfeited on conviction, all *bonâ fide* incumbrances created prior thereto are valid. Even in forfeiture for treason the only incumbrances affected are those after the date of the treason; 3 Inst., 211. The Government had perhaps a right to confiscate what was the King's, but not what had become the property of his creditors.

The Circular No. 112, issued by the Judicial Commissioner, entitles the mortgagees of estates held by the King to have payment; and this Circular, sanctioned by the Supreme Government, had the force of law under the Indian Councils Act, 24 & 25 Vict., c. 67, s. 25. The Circular is a fair and equitable recognition of the rights of the creditors of the deposed King. The learned Counsel referred to several American authorities as to seizures of property during the late war, but their Lordships were of opinion that the cases were not parallel.

Mr. *Forsyth*, Q.C., and Mr. *Merivale* for the Government.—As a matter of fact there existed, at the time of the confiscation by the Government, a state of war. The work of the Courts was suspended; see Co. Lit., 249 b; *Elphinstone v. Bedree*

(1) Unreported.

(2) Doug., 694.

(3) *Ante*, p. 120.

(4) 11 Moore's I. A., 277.

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Chund (1). The case of *The Secretary of State v. Kamachee Boye Sahaba* (2) is in point. The names of the King of Delhi and the Rajah of Tanjore were included in the Appendix to the Report of a Committee of the House of Commons in 1832 as being similar in every way—The case of *The East India Company v. Seyd Ally* (3). It is a matter which no Municipal Court could enquire into. The plaintiffs seek relief not as having a right to bring an ejectment or to foreclose a mortgage, but under an alleged right founded on the Circular No. 112; and unless they can show such a right, the suit must be dismissed. This Circular has not the force of law: if it has, all the Circulars have; and if so, the subsequent Circulars expressly adverse to the plaintiffs' particular claim are equally binding. The learned Counsel went at considerable length into the history of the King of Delhi.

Mr. Kay, Q.C., in reply.

Their LORDSHIPS gave the following judgment:—

The appellants in this case are the heirs and representatives of Raja Saligram and Raja Devi Singh, the plaintiffs in the suit. The respondent, the Secretary of State for India in Council, is the defendant. The suit was commenced on the 28th of November 1864 in the Court of the Deputy Commissioner of Delhi, to recover the sum of Rs. 68,853 odd, alleged to be due for principal and interest on certain bonds, which, in the plaint, are called mortgage bonds, executed by the late King of Delhi.

It was correctly stated by Boulnois, J., in delivering his judgment in the Chief Court of the Punjab, that the bonds all acknowledged debts, but that all did not mention the property by which the debts were secured.

The plaint, after stating that the claim is on four mortgage bonds of which the dates and amounts are specified, proceeds to describe the grounds of the defendant's liability in the following words:—"The defendant, owing to the late mutiny, confiscated all

(1) 1 Knapp, P. C., 316.

(2) 7 Moore's I. A., 476.

(3) 7 Moore's I. A., 555.

the landed estate of the late King; but by a Circular No. 112 of the Judicial Commissioner of these provinces, under the orders of the Supreme Government, all mortgages effected by the late King on those estates, which the defendant has confiscated, are to be paid. The plaintiffs having failed in their application to be reimbursed, as will be seen by the proceedings regarding their claim, and being referred to law to obtain their remedy, are necessitated to file this suit, and pray that a summons may issue against the defendant, and he be declared to pay the amount claimed, with interest at the rate specified in the bonds up to realization of decree with costs."

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The plaint, as pointed out by Mr. Forsyth, the learned Counsel for the defendant, is not a suit for ejectment or foreclosure, nor does it pray that the defendant may be declared a trustee for the plaintiffs of the revenues collected from the hypothecated villages. It does not even allege that the defendant, at the time of the commencement of the suit, was in possession of the property. The claim appears in its terms to be founded entirely on a right alleged to have been created by the Circular No. 112 of the Judicial Commissioner. It is to be remarked that the plaintiffs do not claim merely the value of the property mortgaged; for, in the 7th article of their written statement, they say:—"The defendant is liable to the full amount of claim, though it may exceed the value of the property mortgaged, or to return the same to them."

It was, in consequence, contended by the respondent's Counsel with great force that the claimant must be held to the claims actually made by him, and that unless he could succeed in showing that the Circular had given him the right alleged, his claim must necessarily be dismissed. Having regard, however, to the written statement of the defendant, to the issues raised, and the mode in which those issues were disposed of in the Courts in India, their Lordships have in this case thought it right to consider the whole matter, as it was presented to those Courts and at their Lordships' bar.

It must be taken upon the evidence that the late King was, at the time of the confiscation, indebted to the plaintiffs upon the bonds set forth in the plaint; and that, either by the terms of

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the bonds, or by his letters to Sir Thomas Theophilus Metcalfe, the Resident at the Court of Delhi, the King had, so far as he lawfully could, assigned and appropriated to the discharge of the bond debts certain amounts, which the Resident was requested to pay yearly out of the revenues of certain of the royal *tayul* villages. It is admitted, in the 1st and 2nd articles of the defendant's written statement, that the property, so alleged to have been mortgaged to the plaintiffs, was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown. Several defences were set up in the written statement of the defendant, but for the purpose of this appeal it is not necessary to consider any of them except the 1st, 2nd, 5th, and 6th. The 2nd, which relied upon s. 20, Act IX of 1859, and the 3rd, which set up that the defendant was, by Act XXXIV of 1860, indemnified from all liability of every kind in respect of seizure and appropriation of the property alleged to have been mortgaged, were abandoned by the learned Counsel for the defendant upon the argument of this appeal.

The first ground of defence was that the property alleged to have been mortgaged to the plaintiffs was, together with all rights and interest in and in respect of it, seized and appropriated by the defendant on behalf of the British Crown, on political grounds, as an act of State; and that, consequently, no claim against the defendant as having thus taken possession of the said property was cognizable in the Court in which the suit was instituted, or in any other Municipal Court.

The 2nd was similar to the 1st, with the addition that the seizure was "during the continuance and in the prosecution of war."

The 5th and 6th were as follows:—(*reads them, ante, p. 175.*)

Several issues were raised; of these the only important ones to be considered are the 1st, 4th, 5th, and 6th. They are as follows:—(*reads them, ante, p. 175.*)

The case was tried by Mr. Coldstream, the Assistant Commissioner of Delhi, who, in a very elaborate and well-considered judgment, found those issues for the defendant, and gave judgment in his favor. A regular appeal was preferred from that

judgment to the Commissioner of Delhi, who upheld the decision of the Assistant Commissioner.

A special appeal was then presented to the Chief Court of the Punjab. That appeal was dismissed, upon the ground that the suit was not cognizable in a Municipal Court. The appeal to Her Majesty in Council is expressed to be against the judgment of the Chief Court of the Punjab and the several judgments of the Commissioner and Assistant Commissioner of Delhi. There is no dispute, however, as to the facts, and the questions now to be considered are, whether the seizure or confiscation of the property of the late King was an act in respect of which the Municipal Courts have jurisdiction? Whether the Circular Order of the Judicial Commissioner, No. 112, vested a right of action in the plaintiffs which can be enforced against the Government by a Court of law? And whether the plaintiffs had a right or interest in the property, which was not affected by the confiscation of the King's domains. The last was the proposition mainly relied on by the appellants' Counsel before their Lordships.

The Commissioner of Delhi remarked in his judgment "that in the use of the words 'confiscation' and 'seizure' and 'appropriation,' the Court did not perceive any material distinction or difference;" and one of the grounds of appeal to the Chief Court was that the ruling of the Commissioner as to the meaning of those words was erroneous. The appellants say, in the second ground of their appeal, "the King of Delhi's property was confiscated, and the appellants do not dispute the right of Government to confiscate it; but the King had only a right to that which remained after satisfying the appellants' claim, and to this alone is the defendant entitled by virtue of confiscation. The appellants' property was not confiscated." Mr. Kay, in his argument, treated the word "confiscated" as if it were used in the sense of forfeited for a crime, and he cited cases to show the distinction between "forfeiture" and "escheat." The former, he urged, did not affect *bonâ fide* incumbrances created by the offender before forfeiture. He admitted that the confiscation was an act of State, but he denied that it affected the rights which the plaintiffs had derived from the King by virtue of the

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mortgages. His argument as regards the effect of a forfeiture upon a regular conviction for a crime would have been correct, if he could have shown that the confiscation of the King's property was an act in the assertion of a right conferred by the law of forfeiture. But such was not the case. Neither was the law of forfeiture in force in the case of natives of India convicted of crimes beyond the limits of the Supreme Court, whatever might have been the case within those limits (as to which it is not necessary to express an opinion), nor did the Government affect or purport to act under any such law. The word "confiscation" as used by the Commissioner of Delhi, in his proceeding of the 3rd of October 1857, does not import that the appropriation to the public use was for a crime. He says the confiscation of all the Crown villages, &c., having been deemed proper, &c., it is ordered, &c., that perwannahs be issued to the tehsildars, &c., to confiscate all the villages, &c. In other words, the revenues were to be brought into the public treasury. The word "confiscation" does not, *per se*, necessarily import that the appropriation is to be made as a penalty for a crime; and even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of State of the property of a public enemy, or of a subdued or deposed ruler.

The Assistant Commissioner found as a fact, that which is well known as a matter of history, that the King was not tried by a regular Court, and that his trial by a Court under a special commission did not take place for some months after the attachment had taken place.

Boulnois, J., in his judgment says:—"After the mutiny in 1857, on the 18th of September in that year, the King of Delhi was captured by the British Government, and made a prisoner of war, having been for some time the nominal head of the insurgents in Delhi. On the 3rd October in that year, the Commissioner of Delhi, on behalf of the Government, attached and took possession of the ex-King's lands. This appropriation accompanied the extinction of the political existence of the representative of the Delhi line of kings. It did not

affect to justify itself on any ground of Municipal law; and it seems to have been (considering the person who had owned the property seized) an act of power on the part of the British Government exercised in a matter of State. There is, however, additional evidence to show that the authority of Government in that character, which renders it superior to positive law, was brought to bear in this act, for the seizure of the King's lands was an appropriation of an enemy's property, *flagrante bello*."

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It is not necessary to express an opinion as to what is the effect of the seizure of property of a subject by a Government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection: nor is it necessary to deal with the cases which have been cited from the American Reports in regard to acts which took place during the late war in that country. The case of the plaintiffs, who claim under grants from the King, is very different from that of a subject deriving title under an ordinary tenure.

It is necessary to consider under what circumstances the late King of Delhi acquired a title to the property charged with the payment of the bond debts, if, indeed, he can be held to have had any legal title whatever to the same, beyond the mere will of the British Government. As to this point, it appears that, after the Emperor Shah Alum, the grandfather of the late King, had been rescued from the power of Dowlut Rao Scindia, and placed under the protection of the British Government, it became a matter of political expediency to determine the nature and extent of the provision to be assigned for the support of His Majesty and of the royal household. The subject was fully discussed in the Notes of Instructions transmitted by Mr. Edmonstone, the Secretary to Government, to Colonel Ochterlony, the Resident at Delhi, in a letter dated the 17th November 1804 (4 Wellesley Despatches, p. 237), of which notes a copy was also dispatched to his Excellency the Commander-in-Chief. Subsequently, on the 23rd May 1805, the final determination of the Governor-General in Council upon the subject was communicated to the Resident at Delhi,

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by letter from the Secretary to Government of that date (see same vol., p. 542).

That arrangement was as much an act of State as if it had been carried into effect by formal treaty signed by the British Government.

Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded upon treaties—*The East India Company v. Syed Ally* (1) and *The Nabob of the Carnatic v. The East India Company* (2). The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property.

If, shortly after the arrangement had been made, the British Government had found it necessary as a matter of political expediency to alter, without the consent of Shah Alum, the arrangements introduced into the assigned territory, it is impossible to conceive that a Court of Law would have had jurisdiction to enforce the arrangement in a suit brought by His Majesty, either by granting a specific performance, or by awarding damages for the breach of it.

The King of Delhi having joined in hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support, was for a time suspended. Delhi fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the King of Delhi was taken as a prisoner of war. The revenues and territories which in 1804 were, by an act of State, assigned for the maintenance of Shah Alum and his household, were in 1857, also by an act of State, resumed and confiscated.

The seizure and confiscation were acts of absolute power, and were not acts done under color of any legal right, of which a Municipal Court could take cognizance.

(1) 7 Moore's I. A., 555.

(2) 2 Ves., Jun., 56.

The status of Shah Alum (1) was that of a king. He was treated and recognized by the British Government as a king, and not merely as a *jagirdar* holding under an ordinary grant from the British Government. He was the grandson of Shah Alum, and neither he nor any of his ancestors had ever been deposed by his own subjects, or by the British Government, or by any other power. Shah Alum was described, by Lord Wellesley in his Despatches, sometimes as the "unfortunate representative of the house of Timour," sometimes as "the Mogul" and, again, as "the Emperor." It is unnecessary here to refer more particularly to the extracts from the Despatches which have been pointed out in the exhaustive arguments in the lower Courts. If further arguments were necessary, with reference to the status of the late King, and of his grandfather Shah Alum, the Despatch of Lord Wellesley to the Secret Committee of the Court of Directors of the East India Company of the 13th July 1804 (4 Wellesley Despatches, p. 132), might be referred to.

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The status of the King of Delhi and that of the Begum Sumroo were very different. The latter was held not to be a sovereign princess, but a mere *jaidadar* under Scindia; and this fact distinguishes the present case from that of *Forester v. The Secretary of State for India* (2), in which the judgment of the Judicial Committee was pronounced on the 13th of May last. In that case it was also held that the act of Government was not the seizure by arbitrary power of territories, which up to that time had belonged to another sovereign State; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. It was said:—"The possession was taken under color of a legal title, that title being the undoubted right of the sovereign power to resume, and retain, or assess to the public revenue, all lands within its territories upon the determination of the tenure under which they may have been exceptionally held free. If by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title

(1) *Sic*; probably a printer's mistake for Mahomed Bahadur.

(2) *Ante*, p. 120.

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of the Government, that claim, like any arising between the Government and its subjects, would, *prima facie*, be cognizable by the Municipal Courts of India." The seizure of the royal *tayul* villages, for the reasons above given, does not fall within the ruling of *Forester v. The Secretary of State for India* (1), but is governed by the principles laid down in *The Secretary of State in Council v. Kamachee Boye Sahaba* (2) and *The East India Company v. Syed Ali* (3), and in other cases in which the same principle is affirmed. But it is contended that these considerations do not necessarily determine the right of the mortgagees, who are British subjects, to what they claim. It is argued that the British authorities had given Shah Alum estates in British territory to be dealt with at his free will and pleasure, so that the charges *bonâ fide* created by him while in possession, *de facto* and *de jure*, as owner, survived his deposition. But their Lordships are clearly of opinion that no such ownership, or power of disposition, was conferred upon Shah Alum or his successors. The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their high position. If he had died or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

Their Lordships are further clearly of opinion that the Circular Order No. 112 does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of the 24 & 25 Vict., c. 67. The Circular was merely a Circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the Punjab, a copy of correspondence between the Government of the Punjab and the Government of India, on the question of the liability of Government for the debts of rebels whose estates had been confiscated for rebellion.

(1) *Ante*, p. 120.

(2) 7 Moore's I. A., 476.

(3) 7 Moore's I. A., 555.

It is clear from the whole tenor of the correspondence which originated out of certain questions referred by the Judicial Commissioner of the Punjab for the decision of the Lieutenant-Governor of the province that the Government did not intend to lay down any rule of law, for the breach of which redress might be obtained in a Court of Law, or to use the words of Lord Kingsdown in *The East India Company v. Syed Ali* (1) "to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal." They intended only to declare the course which a sense of justice and equity would induce them, in their discretion and as an act of favor, to adopt. The correspondence in Circular No. 112 did not apply to the appellants' case. That was treated of in the Circular of the 12th January 1861, in continuation of Circular No. 112. In that Circular of the 12th January 1861, the correspondence on the subject of the appellants' claim was forwarded, and amongst other letters one from the Officiating Secretary to the Government of India to the Secretary of the Government of the Punjab, dated 28th December 1860. (*After reading the 6th and 7th paragraphs of the letter which is set out, ante, pp. 173 and 174, their Lordships continued.*) Even if the prior Circular, on which the appellants rely, could on any fair principles of legal construction be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of law.

Their Lordships think it desirable to make a few observations on the case of *Lalla Narain Doss v. The Estate of the ex-King of Delhi* (2), in which this Board came to a conclusion in favor of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shows how it came to be a matter of judicial cognizance. The plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to

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(1) 7 Moore's I. A., 555.

(2) 11 Moore's I. A., 277

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be,—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was that the plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Agent for the appellants : Mr. *Oehme*.

Agents for the respondents : Messrs. *Lawford and Waterhouse*.

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

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SHEOPERSAD SINGH (DEFENDANT) v. LEELA SINGH AND OTHERS
 (PLAINTIFFS).*

Joint Property—Right of Co-sharers—Alteration of Joint Property by one Sharer without Consent of his Co-sharers—Injunction.

One of several co-sharers of joint undivided property has no right to erect a building on land which forms a portion of such property, so as to materially alter the condition thereof, without the consent of his co-sharers.

THE plaintiffs and the defendant in this case were shareholders in certain joint undivided property. It appeared that they

* Special Appeal, No. 1661 of 1872, from a decree of the Subordinate Judge of Gya, dated the 3rd September 1872, reversing a decree of the Munsif of that district, dated the 8th January 1872.

dwelt round an open country, and which was admitted to form part of the joint property. Upon a portion of this courtyard the plaintiffs began to erect a house (a *natch-ghur*), but were stopped by an order made by the Fouzdari Court on a complaint preferred thereto by the defendant. They then brought the present suit for a declaration of their right to build the *natch-ghur*, alleging that the courtyard was attached to the particular house in which they dwelt, and that they had had exclusive possession of it from time immemorial.

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The Munsif found that the land in dispute was the joint property of both the parties; that there was no evidence to prove that any house existed from ancient times; that the land in dispute was not in the exclusive possession of any of the parties; that none of the parties to the suit could take possession of and enjoy the same as absolute owner without the consent of the other co-sharers, and that the erection of the house in dispute was calculated to prove injurious to the defendant. He accordingly dismissed the plaintiffs' suit.

On appeal, the Subordinate Judge, while recording as an admitted fact that the courtyard was the joint property of the plaintiffs and defendant, at the same time found, as a fact on the evidence before him, that the plaintiffs had had exclusive possession of the land from ancient times, and that the defendants therefore were not entitled to prevent the erection of the house. On this point he cited the case of *Dwarkanath Bhooyea v. Goopeenath Bhooyea* (1). He therefore reversed the Munsif's decree, and gave a decree in the plaintiffs' favor.

(1) *Before Mr. Justice Lock and Mr. Justice Muttler.* — *Joint Property — Right of Co-sharers—Alteration of Joint Property by one Sharer without Consent of his co-sharers.*
The 2nd June 1871.

DWARKANATH BHOOPYEA AND
OTHERS (PLAINTIFFS) v. GOOPEE-
NATH BHOOPYEA (DEFENDANT).*

THIS was a suit to recover possession of a share in certain lands, which the plaintiffs claimed as the joint property

* Special Appeal, No. 189 of 1871, against a decree of the Subordinate Judge of Zilla Midnapore, dated the 10th November 1870, reversing a decree of the Munsif of that district, dated the 28th January 1869.

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The defendant appealed to the High Court.

Mr. *Woodroffe* (Baboo *Mohesh Chunder Chowdry, Chunder Madub. Ghose, Kalimohun Doss*, and *Hurry Hur Nath* with him) for the appellant.

Mr. *Evans* (Mr. *Twidale* and Baboo *Nilmadhub Sen* with him) for the respondents.

of themselves and the defendant, and for the demolition of certain buildings which the defendants had erected, without the plaintiff's consent, on a portion of the lands in dispute, described in the plaint as plot No. 2.

The defence raised was that plot No. 2 had been in the exclusive possession of the defendant for more than twelve years, and that the suit therefore was barred by the law of limitation.

The Munsif found that the property was joint, and that the plaintiffs were entitled to a sixth share thereof. He therefore gave the plaintiffs a decree for possession, and ordered the demolition of the buildings.

On appeal, the Subordinate Judge, relying on a certain deed of partition which he assumed to have been executed by the ancestors of the litigant parties, and on certain resumption proceedings which in his opinion conclusively showed that the plaintiffs' ancestors had lost possession of the disputed property, thirty-five years before the institution of the suit, towards the end of his judgment observed that the possession of the defendant had been also satisfactorily proved by his witnesses. He accordingly dismissed the plaintiffs' suit.

The latter appealed to the High Court.

Baboo *Doorga Mohun Dass* for the appellants.

Baboo *Hem Chunder Banerjee* for the respondent.

The judgment of the Court was delivered by

MITTEE, J. — (who, after stating that the Subordinate Judge had committed several errors in law in the investigation of this case, so far as he relied on the partition deed and the resumption proceedings, and that his conclusion as to the testimony of the defendant's witness appeared to have been arrived at on the strength of his observations on that deed and the resumption proceedings, continued).— We therefore reverse the decision of the Subordinate Judge so far as plot No. 2 is concerned, and remand the case to him with directions to re-try it with reference to the evidence on the record.

We wish to observe, however, that the plaintiffs' claim for the demolition of the building erected by the defendant on the land covered by plot No. 2 cannot be maintained. Even if the land be found to be the *ijmali*, the defendant was clearly entitled as a co-partner to use every inch of that land; and if by erecting the building in question, he has taken possession of more land than he would be entitled to on a partition, the proper course for the plaintiffs to adopt would be to sue for a division of the lands, and not to ask the Court for the demolition of the building.

The costs of this appeal will abide the ultimate result.

Mr. Woodroffe, for the appellant, contended that as the land in dispute was admittedly the joint property of the plaintiffs and defendant, the plaintiffs could have no right to do any thing which would alter the condition of the land without the consent of their co-sharer—*Crowdee v. Bhekdhari Sing* (1), *Gurudas Dhur v. Bijai Gabind Boral* (2), *Holloway v. Sheikh Wahed Ali* (3). The case of *Dwarkanath Bhooyea v. Gopeenath*

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(1) 8 B. L. R., App., 45.

(2) 1 B. L. R., A. C., 109.

(3) *Before Mr. Justice Bayley and
Mr. Justice Ainslie.**The 7th July 1871.*HOLLOWAY (DEFENDANT) v. SHEIKH
WAHED ALI AND OTHERS (PLAINTIFFS).**Joint Property—Right of Co-sharers
—Alteration of Joint Property by
one Sharer without Consent of his
Co-sharers.*Baboos Hem Chunder Banerjee and
Nilmadhub Sen for the defendant.Moonshee Mahomed Yusoof and
Baboo Boodh Sen Singh for the
plaintiffs.THE judgment of the Court was
delivered byBAYLEY, J.—WE think this special
appeal must be dismissed as utterly
groundless.Three pleas have been taken before
us: 1stly, that a co-sharer in landedproperty has a right to do anything
(e. g., to commence a building), which
alters the condition of the joint prop-
erty, without the consent of his co-
sharers.

On this point, which I have put in the very words of the pleader, if the word "not" be preferred to a right, it will in the exact words convey the ruling of Jackson and Glover, JJ., in the case of *Gurudas Dhur v. Bijai Gabind Boral* (a). My colleague, Ainslie, J., has pointed out to me the above decision, which, I consider, fully disposes of the plea taken; but the pleader for the appellant, Baboo Hem Chunder Banerjee, has, after a prolonged argument, relied on the case of *Shaw Khairuddin Ahmed v. Sheikh Abdul Bak* (b), the facts of which, I have no hesitation in saying, are not the facts of this case. That was a case for the rent of certain land attached to a dwelling-house, which the defendant was deemed entitled to hold at an equitable rent, in which it was decided that such a suit could not be maintained in the Revenue Court.

The case of *Lala Biswambhar Lal v. Rajaram* (c) has been also relied upon, but in that case it was simply

* Special Appeal, No. 884, preferred on the 14th April 1871, against the decision of the Subordinate Judge of Zilla Bhagnulpore, dated the 81st January 1871, affirming a decree of the Moonsiff of Bulia, dated the 81st August 1870.

(a) 1 B. L. R., A. C., 109.

(b) 8 B. L. R., A. C., 65.

(c) 8 B. L. R., App., 67.

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Bhooyea (1) is not applicable to the present suit. The plaintiffs must show that they have a right to the exclusive enjoyment of the land in dispute.

held that, where two parties were the joint owners of land, and one of them completed the erection of a wall upon the land without obtaining the consent of his co-sharer, the Court would not interfere to order the demolition of the wall, where there was no evidence to show that injury had been done to the co-parcener of the builder by its erection.

This brings us to the second point, which is that no injury had been caused to the plaintiff. Now the second plea must be considered by the light of the ruling cited on the first point in support of our decision on that point, *viz.*, that a person has no right to do anything without the consent of his co-sharer which alters the condition of the joint property. To build a factory, *viz.*, upon a title derived from one co-sharer without the consent of the other co-sharers, would no doubt involve an infringement of the rights of those co-sharers, and this very infringement involves an injury.

We have been pressed with a doctrine of law from which, however, I do not differ, which has been recognized so far back as the year 1856 in *Janokee Dossee's* case (a), *viz.*, that where a coparcener stood by and saw the completion of a building on the joint land, commenced without his permission, without raising any kind of objection to it, he must be supposed to have impliedly consented thereto: but in the present case the building was not completed; the objection was taken when the execution was commenced, and an injunction actually obtained

directing the stoppage of further progress of the building. Moreover, the defendant Holloway in this case admittedly derives his title from Omdao Singh, whose proprietary right in the property has been found by the lower Appellate Court to be very small (1½ cowries), and who alleged himself to be firstly a *kahsthar* (farmer), and then a *malik*. His *kahsthar* title has been found to be a forgery, and, therefore, the defendant has simply to base his title as derived from a *malik* of a very small portion of a joint undivided property. Were we to say that, in a case like this, no demolition of the building ought to be allowed, we should have to declare that a party is entitled, in the double capacity of a *malik* and *kashthar*, to give title over a whole *ijmali* property, when as *kashthar* he has no proprietary title, and as *malik* only a small fractional one.

I am reminded by Ainslie, J., that the case of *Lala Biswambhar Lal v. Ragaram* (b) contains a *dictum* of the late Chief Justice, Sir Barnes Peacock, which would be entirely against the appellant, even if he had any legal right, *viz.*, that "a man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights." In the present case, however, the defendant had no such right over the whole property, and it follows that a Court of Equity had no occasion to lend its aid.

In this view we dismiss this special appeal with costs.

(1) *Ante*, p. 189.

(a) Probably *Jantee Singh v. Buthoorce Singh*, S. D. A., 1856, 761, is the case referred to.

(b) 3 B. L. R., App., 67.

Mr. *Evans*, for the respondents, contended that the plaintiffs, as joint owners, were entitled to the use of every part of the joint land, unless some damage be shown. The defendant cannot resist the plaintiffs in the enjoyment of the land in dispute; *Bindubasini Debi v. Patit Paban Chattapadhia* (1) and *Lala Biswambhar Lal v. Rajaram* (2). The lower Appellate Court has found that the plaintiffs were in exclusive possession of the property in dispute, and upon this finding the plaintiffs are entitled to retain possession.

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Mr. *Woodroffe* in reply.

The judgment of the Court was delivered by

PHEAR, J.—It appears that the plaintiffs were commencing the building of a house (*natch-ghur*) in an open space of the courtyard, around which the parties to this suit seem to dwell; but they were stopped by an order made by the Fouzdari Court on a complaint preferred thereto by the defendant. In effect they bring this suit for the purpose of getting rid of this order of the Fouzdari Court, which operates as an injunction restraining them from building upon the land which is the subject of suit; and it so operates, as I had occasion to point out during the argument, until the plaintiffs shall get an authoritative declaration of a Civil Court of their right to carry on the building without obstruction on the part of the defendant. We are thus in this suit called upon to say whether or not the plaintiffs have the right upon which they rely, to build in the courtyard, or plot of ground, which forms the subject of suit. It seems to be admitted that this courtyard forms a portion of the dwelling ground upon which the various members of the family reside; and the lower Appellate Court has recorded that it is admitted to be joint and undivided property of the plaintiffs and the defendant. The plaintiffs, however, contend that it is a courtyard or compound attached to the particular house in which they dwell, and that they have had, in that sense, exclusive possession of it from time immemorial, and, therefore, are entitled to do with it

• (1) 3 B. L. R., A. C., 267.

(2) 3 B. L. R., App., 67.

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what they like. That at any rate is pretty much the contention which has been made in argument in this Court, though no doubt the plaintiffs only claim the right of building this structure upon the foundation of some previously existing building.

The lower Appellate Court, starting with the admission that this courtyard is a joint undivided property of the plaintiffs and their co-sharers, including the defendant, also has found, as a fact upon the evidence before it, that this disputed land has been held from ancient time by the plaintiffs. This is somewhat a vague finding. But it is, perhaps, made a little more precise by what seems to me, further on in the judgment, to be a finding to the effect that the defendant had not had occupation of it. It is important however to remark at the outset that, whatever these findings of fact of the lower Appellate Court amount to, the parties themselves have not contended in this suit that there ever was a partition of the land which is the subject of suit. The plaintiffs do not say that they have got a right to build upon this courtyard, because it has come to be their own exclusive property, by reason of anything which must be treated in effect as a family partition; they go no further than saying that they have been enjoying the space from time immemorial, as a courtyard appurtenant to their dwelling-house, which they occupy by right of their being members of the joint family. This being so, it appears to me that the findings of the lower Appellate Court do not suffice to support the allegation of right, upon which the plaintiffs come into Court. I ought to add that the first Court has found the further fact, that there was no structure or foundation previously on the spot upon which the plaintiffs are now building. And although the plaintiffs, in their appeal to the lower Appellate Court, objected that the first Court had not sent out an Ameen for the purpose of procuring all the information which he ought to have procured bearing upon this question, they did not object to the correctness of the first Court's finding in regard to that question on the evidence as it stood. The lower Appellate Court in its judgment makes no allusion whatever to this finding of the first Court, or to the complaint of the appellants which I have mentioned; and, I think, it must, therefore, now be taken, in addition to the facts which I have

already detailed, that there was no structure, or foundation of a structure, previously existing on the spot, which has been chosen for the building of this *natch-ghur*. I repeat, then, that I think the case, as found by the lower Appellate Court, does not give the plaintiffs the right which they seek to have declared. In my judgment, as I understand joint possession under Hindu law, that peculiar exclusive possession of a part of a common dwelling-house, or set of dwelling-houses, which one member of a joint family obtains very commonly without an actual partition having been come to between the members of the family, is a possession which must be referred to the continuing consent of his co-sharers. So long as no actual partition is come to, either as a result of a suit, or formally between the parties themselves, or evidenced by long acknowledgment on the part of the members of the family, the possession is merely that which, for convenience sake, is conceded by all the members jointly to each one of them; and it may be put an end to, and a completely new arrangement come to, at any time, by the members of the family, if they think fit to make the change. As long, however, as this peculiar state of exclusive possession is allowed to remain, it seems to me that it must be taken that the acquiescing members of the family concede to the person, who has the exclusive possession, all reasonable rights of user of his separate plot, or separate portion of the dwelling-house, as is necessary for the ordinary purposes of residence, having regard, of course, to the circumstances of Hindu life.

I think upon the authority of the cases (some of which have been cited) decided in this Court, we must hold that the concession on the part of the acquiescing members does not go to the extent of enabling the possessor of the dwelling-house to alter the character of the property, or to do any thing with it which is not consistent with such user of it as might be ordinarily expected to take place. If he desires to build a new and additional structure upon a portion of the house ground, it seems to me that he has no right to do so, and in that way materially to alter the condition of the property, without obtaining the assent of his co-sharers. If this view be correct, assuming that the plaintiffs in the present suit had an exclusive possession

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of the courtyard, as an adjunct to the particular portion of the dwelling-house which they occupied, I think they would not be entitled to use that courtyard otherwise than for the ordinary purposes of, and incidental to, residence in their house, without the assent and knowledge of their co-sharers. They have attempted, confessedly without the permission of the defendant, one of their co-sharers, to build upon it, according to the finding of the lower Court, an entirely new structure, namely a *natch-ghur*. It is not pretended that any thing of the kind before existed there, or anywhere in proximity to it, as a part of their dwelling-place. It seems to me that in attempting to do this they have gone beyond their right. It has not been shown, or attempted to be shown, upon the evidence, that it is an usual thing, or a step to be expected, of an occupier of a dwelling-house of this kind, as a member of a joint unseparated family, that he should erect a *natch-ghur* in the middle of his courtyard. And, inasmuch as this suit is brought to get an authoritative declaration from the Civil Court to the effect that the plaintiffs have a right, as against their co-sharer, the defendant, to build this *natch-ghur*, under the circumstances which I have mentioned, I think the plaintiffs fail to make out their case. It seems to me that upon the findings of fact, which the lower Appellate Court has come to, the plaintiffs' suit ought to have been dismissed. For these reasons I would uphold the appeal, and dismiss the plaintiffs' suit with costs in all the Courts (1).

Appeal allowed.

(1) See next case.

Before Mr. Justice Phear and Mr. Justice Ainslie.

STALKARTT (ONE OF THE DEFENDANTS) v. GOPAL PANDAY AND
OTHERS (PLAINTIFFS).*

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June 12.

*Joint Property.—Right of Co-sharers.—Alteration of Joint Property by one
Sharer without Consent of his Co-sharers.—Injunction.*

One of several co-sharers of joint undivided property has no right to take exclusive possession and alter the condition of any portion of the joint property without the consent of his co-sharers, and the Court will grant an injunction to restrain him from doing so.

THE plaintiffs and defendants were shareholders in a certain mauza, of which an undivided 4-anna share belonged to the plaintiffs, and the remaining 12-anna share to the defendants. From 1273 to 1277 (1860 to 1870) the defendants, besides their own share, held a ticca lease of the plaintiffs' 4-anna share, and during that time they took into their sole occupation certain lands which had been abandoned by the ryots, and planted them with indigo.

In 1277 the ticca lease of the 4-anna share came to an end, and that share reverted to the plaintiffs, who thereupon objected to the possession and cultivation of the ryoti land by the defendants. The latter nevertheless took steps to carry on the cultivation, and the plaintiffs then brought this suit, seeking therein to have it declared that they were 4-anna shareholders of the whole mauza, and also asking for an injunction to restrain the defendants from cultivating indigo on the lands in question.

The defendant Stalkartt contended that, as *malik* of a 12-anna share in the mauza, he was entitled to cultivate indigo on the land; and that the plaintiffs suffered no damage from his doing so; and he expressed his willingness to pay to the plaintiffs such ryoti rent as should be considered fair and reasonable.

The other defendants did not appear.

* Special Appeal, No. 1688 of 1872, from a decree of the Subordinate Judge of Sarun, dated the 31st July 1872, reversing a decree of the Munsif of that district, dated the 31st July 1871.

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The Munsif held that the plaintiffs were not entitled to prevent the defendants from cultivating indigo on the lands in question, but were only entitled to rent or damages in proportion to their share. He accordingly dismissed the plaintiffs' suit.

On appeal, the Subordinate Judge held that a co-sharer has no right to alter the condition of a joint property without the consent of his other co-sharers. That the defendants had no right to sow indigo in the ryoti land, as such cultivation was injurious to the land; and, citing *Holloway v. Sheikh Wahed Ali* (1), he passed a decree in favor of the plaintiffs, prohibiting the defendants from cultivating indigo on the lands in dispute.

The defendant Stalkartt appealed to the High Court.

Mr. *Twidale* for the appellant.

Mr. *C. Gregory* for the respondents.

Mr. *Twidale* for the appellant.—The lands in dispute were admittedly ryoti lands, and, therefore, the plaintiffs could claim rent from the occupier. The defendant is not a trespasser, he is a co-sharer, and is entitled, like the plaintiffs, to the enjoyment of the lands in dispute. The plaint does not claim any damages, nor complain of any injury being done to the land. The cultivation of indigo is not such an infringement of the plaintiffs' right as co-sharers as to entitle them to sue for an injunction. The case of *Holloway v. Sheikh Wahed Ali* (1) is not applicable to the present case.

Mr. *Gregory*, for the respondents, contended that the appellant was concluded by the finding of the lower Appellate Court that the cultivation was injurious to the lands in dispute. He had no right to alter the condition of the land without the plaintiffs' consent; *Crowdea v. Bhekdhari Sing* (2) and *Gurudas Dhur v. Bijai Gabind Boral* (3)

Mr. *Twidale* in reply.

(1) *Ante*, p. 191.

(2) 8 B. L. R., App., 45.

(3) 1 B. L. R., A. C., 109.

The judgment of the Court was delivered by

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PHEAR, J. (who, after stating the facts, continued),—It appears to me plain upon these facts that the defendant has disturbed that enjoyment of the plaintiffs in the lands in question to which they were entitled as 4-anna shareholders. The lands have not been partitioned, and as holders of an undivided 4-anna share they are part owners of every biga of the whole mauza, and by virtue of that right of ownership, I apprehend that they can claim either to occupy the land themselves jointly with the defendant or the defendant's assignees, or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with their assent. The defendant, however, has personally taken exclusive occupation of a certain portion of the soil, and maintains that he has a right to enjoy that exclusive occupation whether the plaintiffs accord him their permission or not. This appears to me to be a complete disclaimer of the plaintiffs' right as 4-anna shareholders; and to the extent to which the defendant has acted up to his assertion, he has ousted the 4-anna shareholders from their rights in the land. In a case in England wherein three persons, tenants in common of certain lands to the extent of five-sixths of it, leased the land to a railway company who made a railway upon it; this was held to be such an exclusion of the remaining tenant in common (one-sixth shareholder) from the land—such an obstruction to his right of entrance upon the land—as to amount to ejectment; see *Doe d. Wawn v. Horn* (1). So here the one shareholder, the defendant, has taken exclusive possession of the soil, not, as in the case cited, through a tenant, but by his own hand. He does not say that events have occurred which, for any reason, render it obligatory upon, or the duty of, the plaintiffs to assent to his, the defendant's, possession and cultivation of the land. He maintains that he has a right to do what he has done, altogether regardless of the plaintiffs' will in the matter. He is not receiving from occupiers of the land rents, to a share of which

(1) 3 M. & W., 333; & 5 M. & W., 564.

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the plaintiffs are entitled; he is not himself occupying the land, as tenant under the plaintiffs and himself as joint landlords; he is not cultivating and managing the land for the common profit of the plaintiffs and himself, though he may be willing to pay a reasonable rent; he is occupying for himself alone and keeping the plaintiffs off the land. If this be so, the possession which he has taken seems to me, unquestionably, such an invasion of the plaintiffs' proprietary right as amounts at least to a trespass, and that the plaintiffs have good cause to come into Court to complain of that trespass, and to have their rights vindicated and declared. They do not ask for damages, but they ask for an injunction in order that the defendant may be prevented from repeating his acts of trespass, and from continuing his invasion of the plaintiffs' rights in the property. It seems to me that the plaintiffs have established their right to the declaration, as against the defendant, of their being 4-anna shareholders in the land, which is the subject of suit, jointly with the defendant, and of their being entitled, as such shareholders, to joint possession of the land together with the defendant, and they have further, I think, made out a good claim to such remedy as the Civil Court, considered as a Court of Equity, can give them against repetition of the trespass complained of.

In ordinary cases of trespass, no doubt, where the trespasser is a mere stranger, a judgment which authoritatively declares the plaintiff's right and awards him damages, affords sufficient relief. But in the present case, the defendant himself is entitled to possession as well as the plaintiffs, and his wrongful act has been committed under claim of right. Under circumstances such as these, it appears to me that a Court of Equity is justified in protecting the plaintiffs' interest by a perpetual injunction, if it sees fit on all the facts to do so; and I think, that there are many English authorities to this effect; see *Loundes v. Bettie* (1). The Court, no doubt, will not generally interfere by injunction to control a tenant-in-common's dealings with joint property which is rightly in his possession, unless those dealings threaten to be of a destructive character; but it will compel him to allow his co-tenant a proper share in the enjoyment of the property. In this view

the injunction in the form which the lower Appellate Court has given to it, is probably not altogether satisfactory. It should be expressed in such a way as to be limited to the prevention of the particular trespass of which the defendant has been proved guilty. That trespass has been in fact an ouster of the plaintiffs from the enjoyment of the property, by the act of taking exclusive possession of certain land against their consent. I think, therefore, the injunction ought to be directed particularly to this conduct; and the defendant ought to be restrained from excluding the plaintiffs from possession of the land as joint sharers, and also restrained from taking exclusive possession of the land, or retaining exclusive possession of the land, or from giving exclusive possession of it to any person by lease or otherwise without the consent of the plaintiffs. In effect the appeal is dismissed, and the appellant must pay the respondents their costs.

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Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Birch.

MUDHUN MOHUN SINGH (DEFENDANT) v. KANYEE DOSS
CHUCKERBUTTY (PLAINTIFF).*

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August 19.

*Execution of Decree, Suit for Property wrongfully taken in—Jurisdiction—
Act XXIII of 1861, s. 11.*

Where a party who has obtained a decree for land takes possession by his own act, and not by the act of the officer of Court, of more land than the decree gives him, *Held*, that a suit will lie to recover back possession of any land taken in excess of the decree.

THE plaintiff brought this suit to recover possession of four plots of land of which he said the defendant had dispossessed him under color of a certain decree of Court. In his plaint he stated his case thus:—"The defendant instituted a suit against me, and obtained a decree giving him khas possession of the māl lands

* Special Appeal, No. 1907 of 1872, from a decree of the Judicial Commissioner of Chota Nagpore, dated 9th August 1872, affirming a decree of the Munsif of that district, dated 14th March 1872.

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of Mauza Nibra in Pergunna Ryepore, and proprietary right to the māl lands of the remaining mauzas; but under the pretext of taking possession by an execution of the said decree, the defendant in the presence of myself and my co-sharers forcibly dispossessed me of the four plots of land." He then proceeded as follows: "On the 15th Assar the defendant falsely alleging that those four plots of land were *mani* land covered by the said decree took possession, and is now unjustly in possession thereof. The defendant has also levelled the *iles* (landmarks) intervening as marks of demarcation between the said *jumai* lands in my possession and the *mani* lands, and so has joined them together."

The defendant alleged that the lands in dispute were included in the decree he had obtained against the plaintiff, and that the officer of Court delivered possession to him according to the boundaries stated in the decree. He further stated that the allegation as to forcible dispossession was false; and that the plaintiff had already brought before the Court the objections he now raised in a petition which was dismissed.

The Munsif was of opinion that the plaintiff had proved his case, and accordingly gave him a decree on the ground that the lands in dispute were not the lands comprised in the decree which the defendant had obtained against the plaintiff. On appeal the Judicial Commissioner confirmed the decision of the Munsif: he found as a fact that the defendant had himself destroyed the eastern boundary of one of the plots called Bankra.

The defendant preferred a special appeal to the High Court.

Mr. G. Gregory (with him Baboo Bhowanichurn Dutt) for the appellant, contended that, under the circumstances, the suit was barred by s. 11, Act XXIII of 1861. The plaintiff ought to have petitioned the Court which was executing the decree; or, if he had done so already and his objections had been disallowed, he ought to have appealed. [MARKBY, J.—Was this objection taken in the Court below?] It does not appear that it was; but the Court has the power to allow it to be taken now. The question is one of jurisdiction, and if it be true that the suit will not lie, the proceedings

in the Courts below are wholly null and void. There are several cases where it has been held that such a suit will not lie: *Muttuvelu Pillai v. Vythilinga Pillai* (1), *Jogendro Narain Coomar v. Ranee Surnomoyee* (2), *Radha Gobind, Shaha v. Brojender Coomar Roy Chowdhry* (3).

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(1) 5 Mad. H. C. Rep., 185.

(2) *Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.*

The 8th June 1870.

JOGENDRO NARAIN COOMAR (Defendant) v. RANEE SURNOMOYEE (Plaintiff).*

Execution of Decree, Suit for Property wrongfully taken in—Jurisdiction—Act XXIII of 1861, s. 11.

Baboo *Tarucknath Dutt* for the appellant.

Baboons *Sreenath Doss, Bhuggobutty Churn Ghose, and Muttylal Mookerjee* for the respondent.

The judgment of the Court was delivered by

HOBHOUSE, J.—The plaintiff in this suit, who is the special respondent before us, sued to recover certain lands under the following circumstances:—The defendant, who is the special appellant before us, held a decree of date the 17th July 1860 for the recovery of certain lands from the plaintiff within certain boundaries specified in the decree. In execution of that decree, that is, on the 22nd April 1866, the present defendant, then the decree-holder, took possession of the lands now in dispute, averring that they were covered by the

decree. This possession, it is admitted, was given to the present defendant through an officer of the Court, that is, through the Civil Court Ameen. Thereafter, that is, some time in May 1866, the present plaintiff, then the judgment-debtor, appeared before the Court which had jurisdiction to execute the decree of the 17th July 1860, and complained that the present defendant, then the decree-holder, had illegally taken possession of the lands now in dispute, because they were not covered by the decree of the 17th July 1860. The Court determined that the decree in question did cover the lands in question, and rejected the present plaintiff's complaint to the contrary. This was on the 28th May 1866.

In the present suit the plaintiff sues to recover possession of these same lands, setting up as her cause of action the decision of the Court in execution of decree of the 28th May 1866. The first Court thought the suit would not lie, and dismissed it. The Lower Appellate Court is of opinion that the suit will lie, and has remanded the case for a decision on the merits.

In my opinion the Lower Appellate Court is in error. By the provisions of s. 11, Act XXIII of 1861, it is declared that certain questions as to

(3) 7 W. R., 372.

* Special Appeal, Nos. 149-70, from a decree of the Officiating Judge of Rungpore, dated 18th December 1879, reversing a decree of the Subordinate Judge of that district, dated 8th December 1868.

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Baboo *Nilmadhub Sen* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—In this case we think the objections that a wrong procedure was adopted in bringing a fresh suit, and that

mesne profits are to be determined by the Court executing the decree. And then the section goes on to provide, in so many words, as follows,—“And any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal.”

Now it is to be remarked that these last provisions of this section were enacted by way of amendment of s. 283, Act VIII of 1859; and it is further to be remarked, that whereas the words I have quoted form no part of the provisions of s. 283, on the other hand the provisions of that said section were not in any way general as is the additional provision now before us, but were restricted so as to give to the Court executing the decree jurisdiction only to determine certain specified matters, and none others. It is essential to remark this distinction between the two sections, because when such distinction is remarked then the erroneous extension of jurisdiction, which the words I have quoted in the amended law give, is at once the more apparent.

Then what we have to see for the determination of the point now before us is simply this,—whether the question as to whether or not the lands in dispute were covered by the decree of the 17th July 1870 was a question which arose between the

parties to the suit in which the decree was passed, and which related to the execution of the decree? It seems to me impossible not to say but that this was a question arising between the parties to the suit, and that it did relate to the execution of the decree. The decree was, as I have said before, for landed property within specified boundaries. The plaintiff in that case, who is the defendant in this case, sued to oust the present plaintiff from the lands in question: and I understand that the ouster, or rather the re-entry, for which he prayed, was an actual manual re-entry by the eviction of the present plaintiff, then the defendant. Then in order to execute that decree, that is, to obtain manual re-entry upon the property decreed to him within a specific boundary, it was necessary, that he should apply to the Court which had jurisdiction to execute the decree. Having so applied, it was then incumbent upon that Court to order delivery of the property covered by the decree, and within the four corners of the boundaries expressed in the decree, to the plaintiff, now defendant, by putting him, or any person whom he might appoint to receive delivery, in possession of the land, and if need be, by removing any person who might refuse to vacate the same. This procedure on the part of the Court was rendered incumbent upon the Court by the provisions of s. 223 of the Code of Civil Procedure. Then the defendant in this case, the plaintiff, decree-holder,

the plaintiff ought to have applied under s. 11, Act XXIII of 1861, do not arise.

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in that case, did apply to the Court to be put in actual possession of the properties covered by the decree. He was put in such possession by that Court. Having been so put in possession, the present plaintiff, then the judgment-debtor, applied to that Court and raised the present question. It is almost too obvious to need repetition that the question then raised before the Appellate Court executing the decree, was a question arising between the parties, and relating to the execution of the decree. In fact, if we consider it, it was the very most essential question of all,—the question upon which it depended whether the decree was to be executed or not. It was then, therefore, I consider a question arising between the parties, and it related to the execution of the decree. Then the law goes on to say, in so many terms, that such question shall be determined by the Court executing the decree, and not by a separate suit. Beyond all doubt, these words expressly declare that there cannot be, and shall not be, any separate suit upon such a question; and yet that question is the very question which it is now sought in a regular suit to raise before us. We are confirmed in this opinion by the case of *Ranee Shamasoondery Debee v. Bejoy Gobind Bural* (a), and that decision is no doubt directly in point, and in favor of our view.

But it is said that in *Ranee Surot Soondry Dabee v. Onwar Persad Narain Roy* (b) the learned Judges entertain a different view. On reading the decision in *Ranee Surot Soon-*

dry Dabee v. Onwar Persad Narain Roy (b), it seems to me that to whatever extent it is in point it is directly in favor of our view of the case. For the learned Judges seem to me distinctly to say, by taking the converse of what they do say, that if possession of property shall have been given under an order of Court, by an officer of Court, to a decree-holder, and to whatever extent such possession shall have been given, then, and to that extent, the possession must be considered to have been awarded under a competent Court having jurisdiction in execution of its own decree, and cannot be disturbed. For what the learned Judges say is this, that if, and to whatever extent, possession shall not have been so given, and if the decree-holder shall have taken something in excess of that which was given to him by the Court executing the decree through its officers, then that something would rightly form the subject of a second suit. But that is not the case before us. On the contrary, the case before us comes exactly within the converse of what I understand the learned Judges in that case to have intended to imply.

The case of *Roy Rash Behary Lall v. Bibee Wajun* (c) would seem at first sight to be somewhat against our views. But in the first place, the facts of that case are not given in such detail that we can exactly understand what they were; and in the second place, the decision would seem to have proceeded on a state of facts which is not the state of facts before us. There the learned Judges would seem

(a) W. R., Jan. to July 1864, 881.

(b) *Post*, p. 207.(c) *Post*, p. 208.

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No doubt it has been held in the case referred to—*Jogendro Narain Coomar v. Raneé Surnomoyee* (1)—that although a fresh suit will lie where a party who has obtained a decree takes possession himself of more land than the decree gives him under color of that decree, yet no suit will lie if the party is put in possession, not by his own act, but by the act of the officer of Court. Now, assuming the law so laid down to be correct, yet,

to have said that the decree-holder had taken something which neither the Court executing the decree, nor the decree itself, gave him, and then it was held that for that something a separate suit would lie to recover it. If this is the meaning, and I understand that it is so, of the decision in question, I do not at all dissent from it. On the contrary, I say that it is in strict accordance with the precedent of *Raneé Surot Soondry Dabee v. Onwar Persad Narain Roy* (a) which I have quoted, and is a precedent which I am quite ready to follow.

But a great deal has been made if the illustration made use of by the learned Chief Justice, who was the Judge who delivered the judgment in that case. Supposing the learned Chief Justice said, the decree should be for a cow, and in execution of that decree a horse should have been given to the decree-holder, could it be said that such an absurd thing would be supported, or would it not rather be the subject of a separate suit,—a suit, as I understand it, for the recovery of that which was wrongly taken under color of the decree? But as I understand the law, the illustration, however absurd the case may be which it is intended to illustrate, does not at all show how the law would lie. The question before us is, not what is to be the thing delivered in execution of a decree, but what is the Court which

has jurisdiction to deliver that thing; and therefore, however absurd might be the order of the Court which directed the thing delivered to be delivered, still, unless jurisdiction were given, no other Court would have the power to alter the direction in question. So that however absurd the illustration in question may make out a possible order to be, still that illustration is no guide to us, and ought not to be any guide to us in determining what the proper Court is which has jurisdiction to determine a particular matter. But however that may be, I have no sort of doubt that the question which is now before us was a question which arose between the parties to the decree of the 17th July 1860, and which related to the execution of that decree, and therefore in the words of the Act it was a question which must be determined as it was determined by the order of the Court executing the decree, and not by a separate suit such as is the one before us.

In this view of the case, I would reverse the judgment of the Lower Appellate Court and confirm the judgment of the first Court, and direct that the special respondent, plaintiff's suit be dismissed, and he should pay the costs of this Court and of the lower Appellate Court.

(1) *Ante*, p. 203.

(a) *Post*, p. 207.

as pointed out in another case—*Ranee Surot Soondry Dabee v. Onwar Persad Narain Roy* (1)—before that objection can be taken, it is necessary that it should be very distinctly found in what mode the dispossession took place and was effected; and it is only when these facts have been clearly found that it is

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(1) *Before Mr. Justice Macpherson and Mr. Justice E. Jackson.*

The 26th June 1869.

RANEE SUROT* SOONDRY DABEE
(PLAINTIFF) v. ONWAR PERSAD
NARAIN ROY (DEFENDANT).*

Execution of Decree, Suit for Property wrongfully taken in—Jurisdiction—Act XXIII of 1861, s. 11.

Báboo Gopal Lall Mitter for the appellant.

Baboo Bhyrub Chunder Banerjee for the respondent.

THE judgment of the Court was delivered by

MACPHERSON, J.—This case must be remanded for re-trial.

The plaintiff's case is that, under color of a decree for certain lands which was being executed against her, the defendant got possession of 25 bigas and some katas of land which were not included in that decree.

The Judge has dismissed the suit upon the ground that it will not lie, inasmuch as, upon the plaintiff's own case, the matter is one which ought to have been disposed of under s. 11, Act XXIII of 1861. The Judge further holds that, as an application as to this matter was once made to the Court under that section, the plaintiff's only remedy was by appeal from the order of the Sudder Ameen dismissing that

application, if the plaintiff was dissatisfied with that order.

It appears to me that, upon the case stated in the plaint, the question between the parties is not necessarily one relating to the execution of the decree within the meaning of s. 11 of Act XXIII of 1861. If the taking possession by the defendant of the 25 bigas was a transaction entirely distinct from the getting possession through the officer of Court of the other lands, then the possession which the defendant obtained of the 25 bigas, and the questions arising between the parties relating to that possession, are separate and distinct from the questions arising between the parties and relating to the execution of decree, and, being separate, may be properly made the subject of a separate suit.

The Judge, before he can say whether the suit will or will not lie, must go fully into the case, and find distinctly the facts as to the mode in which the dispossession of the plaintiff was effected. The facts being clearly found, the Court will then be in a position to form an opinion as to whether s. 11 of Act XXIII of 1861 bars the present suit or not. As it is, the facts not being found, it is impossible to say whether the law has been correctly applied.

The case is remanded for trial *de novo*.

* Special Appeal, No. 318 of 1867, from a decree passed by the Judge of Rajshahye, dated the 10th November 1868, reversing a decree of the Subordinate Judge of that district, dated the 8th February 1868.

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possible to say whether or not this objection arises. In the present case the objection has not been taken at all in either of the lower Courts, and all that we find in the plaint is that certain proceedings, by which the plaintiff says he was dispossessed, are said to have been forcible. He says that he was "forcibly dispossessed" by the defendant in execution of decree; and he goes on to set out certain acts, which it is highly improbable were acts of any officer of Court: and the Judicial Commissioner finds as a fact that the defendant himself destroyed the eastern boundary of a plot called Bankra; and he appears to consider that that was the act by which the defendant took possession of the lands in dispute. It is certainly impossible, in the face of that allegation and finding, to presume that the act by which the plaintiff was dispossessed, was the act of an officer of Court, and not the act of the defendant himself. On the contrary, we ought to presume, considering that the objection is only taken at this late stage, in favor of the decision arrived at below, that the suit was properly brought, and that the act by which the plaintiff was ousted was such as would give a new cause of action—*Roy Rash Behary Lal v. Bibee Wajan* (1). Therefore, even upon the authority relied on

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Glover.* THE judgment of the Court was delivered by.

The 20th May 1869.

ROY RASH BEHARY LAL (PLAINTIFF) v.
 BIBEE WAJAN AND OTHERS (DEFEND-
 ANTS).*

*Execution of Decree, Suit for Trespass
 committed in — Jurisdiction — Act
 XXIII of 1861, s. 11.*

*Baboo Debendro Narain Bose and
 Kally Kishen Sen for the appellants.*

*Moonshee Mahomed Yousuff for the
 respondents.*

PEACOCK, C.J.—If the plaintiff's statement in the plaint is correct, something has been done wholly contrary to what the decree ordered, and therefore it cannot be considered as an act done in the execution of the decree. If a decree is obtained for delivering a cow, and a horse is delivered, that cannot be considered to be an act done in execution of the decree, or, if a decree should order Rs. 500 to be levied, and, instead of levying Rs. 500, the execution Court, or the Nazir, should deliver a zemin-

* Special Appeal, No. 464 of 1869, from a decree of the Judge of Patna, dated the 23rd November 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 24th December 1868.

by the appellant, the suit was properly brought, and this appeal must be dismissed with costs.

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Appeal dismissed.

dari, that would not be an execution of the decree. It would be doing something wholly different from that which was ordered by the decree. In this case the decree was to lower a bund to the proper height, and that height was to be regulated according to the papers of the Munsif. If, in addition to lowering the embankment to the proper height, whatever it was, holes have been cut, or breaches made, in the embankment so lowered, it was not done in execution of the decree, which ordered the embankment to be lowered—not that the embankment, when lowered, should be rendered useless by having holes or breaches made in it.

It is said by the first Court:—"It appears to me that the breaches were no other than the effect of the demolition of the bund over the height of one span, as the height fixed was too small to confine the rain waters within the bund; the surface flow was of course violent, and thereby the height of the bund in some places

might have been affected." So that to prevent the bund being affected when it was reduced to its proper height, which was all that the decree ordered, certain breaches were made in the bund, which the Nazir thought were necessary for the protection of the bund at the height to which it was ordered to be reduced. Then he says again:—"But since the plaintiff did not appeal against the order fixing the height at one span, and also overruling his objections as to the alleged eight breaches committed on the bund, the decision of the Munsif is final, and cannot be re-opened by a regular suit."

It appears to me that the decrees of both the lower Courts must be reversed, and the case remanded to the first Court to be tried on its merits. Both parties to be allowed to adduce evidence, and the costs of this appeal, as well as the costs already incurred in the two Lower Courts, to abide the event of the final decree.

PRIVY COUNCIL.

P. C.*
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May 6 & 7.

A. J. FORBES (PLAINTIFF) v. MEER MAHOMED HOSSEIN AND
OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Auction-purchaser—Burden of Proof—Julkurs.—Grounds of Appeal.

An auction-purchaser at a revenue sale of a permanently-settled estate is remitted to all the rights possessed by the original settlor at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders; the presumption in favor of a purchaser resting upon the principle that every biga of land sold must contribute to the public revenue, unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession.

In a suit by an auction-purchaser of a permanently settled estate to recover certain *julkurs* of which the defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the permanent settlement, it was held that the onus was on the plaintiff to prove his title affirmatively.

The Judicial Committee refused to entertain an objection taken in the grounds of appeal, which had not been taken on appeal to the High Court.

Julkur, or the right of fishery, may exist in India as an incorporeal hereditament, and as a right to be exercised upon the land of another.

APPEAL from a decree of the High Court (Bayley and Phear, JJ.,) dated the 31st March 1865, affirming a decree of the Principal Sudder Ameen of Purneah, dated the 26th May 1864, whereby the plaintiff's suit was dismissed.

The facts of the case were, as follows:—

The zemindari of Sultanpore at the time of the decennial settlement formed part of a larger estate called Pergunna Havili, which was then permanently settled in the possession of one Rani Indrobutty; it did not appear at what time precisely the separation of Sultanpore from Havili took place. The respondents were the holders of an *istimrari* tenure which had formed the subject of a grant or *sanad* by Government to

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEARL.

their predecessors at a time prior to the decennial settlement. It was then settled as part of the larger estates of Havili and Sultanpore, in the nature of a dependent talook. The respondents claimed the enjoyment of certain *julkurs* or rights of fishery within the zemindari of Sultanpore, and not entirely confined to their own talook, of which rights they had been in possession for nearly fifty years. No mention, however, of such right was made either in the settlement *kabuliat* made in favor of the Government by Rani Indrobutty when the estate was permanently settled or in the *doul* relating thereto; nor was any such right stated in the *sanad* to the predecessors of the respondents.

On 24th July 1850 the zemindari of Sultanpore was sold for arrears of Government revenue, and purchased by one Pertab Singh, by whom it was sold to the present appellant in April 1851.

The appellant, shortly after his purchase, finding the respondents in possession of the *julkurs*, resumed them and dispossessed the respondents, but on the 30th September 1852, the Magistrate, in a suit under Act IV of 1840, made a decree restoring the same to the respondents, which was confirmed on appeal by the Sessions Judge on 9th April 1853. On 28th May 1860 the appellant sued in the Principal Sudder Ameen's Court of Purneah to recover the *julkurs* from the respondents. He relied on the presumption in his favor as zemindar, and produced, to rebut the case of the respondents, copies of quinquennial registers, certain papers of former *sarbarahkars* of the zemindari, and a lease by one of them of four *julkur* mehals, with oral evidence of the lessee's possession. The respondents relied on the presumption in their favor as *istimrardars*, and on their admitted possession for 40 or 50 years. A local investigation was ordered, and in accordance with the report made thereon the suit, on 7th June 1861, was dismissed. On appeal, the High Court on 1st August 1863 remanded the case for re-trial, stating that without a good plan of the localities generally, and of the disputed fisheries in particular, it was impossible to come to any satisfactory decision. On 26th May 1864 the Principal Sudder Ameen, after two further local investigations, again dismissed the suit, which decree was upheld by the High Court (Bayley and Phear, JJ.) on 31st March 1865.

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From that decision the plaintiff, on 10th November 1866, obtained special leave to appeal to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *Bell*, for the appellant, contended that the decisions of the lower Courts were against the weight of evidence; that the onus lay on the respondents to prove their title to the *julkurs*, which they had failed to do either by the *istimrari sanad* or the oral evidence in the case—*Wise v. Bhoobun Moyee Debia Chowdrainee* (1); that the onus had been wrongly laid on the appellant of proving that the *julkurs* were included within his zemindari; and that if the onus had been rightly laid on him, the evidence was sufficient to show that the *julkurs* were so included—*Forbes v. Meer Mohamed Tuquee* (2). The learned Counsel also referred to the last cited case (3) in reference to the effect of the quinquennial registers produced by him.

An objection was taken in the grounds of appeal that the lower Court had acted without jurisdiction in delegating to an Ameen the substantial issue in the case, *viz.*, whether the respondents had proved their possession of the *julkurs* at and before the decennial settlement. But inasmuch as the point had not been taken before the High Court, their Lordships refused to entertain it.

Mr. *J. Cutler*, for the respondents, was not called upon.

The judgment of their LORDSHIPS was delivered by

SIR J. COLVILLE.—The appellant in this case is the zemindar of Sultanpore. Sultanpore, though now a separate zemindari, appears to have been at the time of the decennial settlement part of a larger estate called Pergunna Havili, which was then settled with a lady styled Rani Indrobutty. When the separation took place does not very clearly appear, but what is clear is that, in the month of July 1850, Sultanpore was put up for sale for arrears of Government revenue, that it was then purchased

(1) 10 Moore's I. A., 165.

(3) 13 Moore's I. A., at p. 468;

(2) 13 Moore's I. A., 438; S. C., and 5 B. L. R., at p. 539.

5 B. L. R., 529.

by one Pertab Singh, and that in the following April he sold it to the appellant, who thereby acquired all the rights which, by virtue of that auction-purchase, had been vested in the vendor.

The respondents may be taken to represent the holders of an *istimrari* or *jagir* tenure which, at the time of the perpetual settlement, existed under a grant or *sanad* from the Government, but was then settled as part of Havili, or, as one may take it, of Sultanpore, in the nature of a dependent talook. It appears that, shortly after the auction-purchase, Mr. Forbes found that the holders of this tenure, which is admitted to be a tenure which he, as auction-purchaser, has no right to destroy, inasmuch as it existed before the decennial settlement, were in possession, and had long been in possession of certain *julkurs*, or rights of fishery. He seems to have attempted by the strong hand, or otherwise, to dispossess them of those fisheries; but on their suit, the Magistrate, by an order dated the 4th December 1852, and made in an Act IV case, affirmed their possession, and on appeal that order of the Magistrate was confirmed by the Sessions Judge on the 9th April 1853.

It further appears by the proceedings that these *julkurs*, or rights of fishery, are of several kinds. Mr. Justice Phear, in his judgment, says "the most important of them is a river, which for portions of its course lies wholly within lands of the plaintiff, and for other portions wholly within the *jagir* or *istimrari* lands of the defendant, and thirdly, in other parts divides the lands of the plaintiff and defendant." There seem to be also some which do not strictly fall within either of the above descriptions. I mean those which are connected with the Seetadhar stream, and partially, at least, consist of rights which during the time of flood are exercised over the appellant's admitted land.

It does not, however, appear to their Lordships to be necessary, at present at least, to examine very particularly into the distinction between these different rights of fishery, because if the Act IV proceeding, which has been referred to, be examined, it will be found that they were all then in question—that the respondents were then found to have been in possession of all of them for a long time anterior to the dispute;

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and it is even stated in the judgment of the Sessions Judge, that the defendant did not deny that possession in fact. They appear to have been all claimed by the respondents as held by the same title, that title being that they had been so held from a date previous to the decennial settlement, and as an incident to the tenure of which it is admitted the respondents or their ancestors were the undoubted holders. The right of possession, or the fact of possession, having been thus found by the Act IV proceedings, Mr. Forbes took no steps to impeach that finding until the year 1860, when he instituted this suit.

Now the first question which their Lordships have to determine is, whether the Indian Courts have been correct in throwing upon the appellant the burden of showing that the *julkurs* which he claimed by his plaint formed part of the assets upon which the settlement of his zemindari was made? For that purpose it seems necessary, although the thing is common learning, to go back to first principles, and to consider upon what the stringent rights which the law gives to a purchaser at an auction-sale really rest.

It cannot be disputed that if there had been no auction-sale it would have been impossible for the zemindar to question, at the time this suit was brought, either the possession or the title of the respondents. There had been, in the year 1844, a previous Act IV case between one of the former zemindars and these parties, in which, as in the later proceeding of that kind, the possession of the respondents had been affirmed, and of course after that it would have been essential for the zemindar to prove that within twelve years of bringing his suit he had been in possession of those *julkurs*; and at the time this suit was brought, twelve years had elapsed even from the date of the award of 1844.

It is conceded that by virtue of the purchase from the purchaser at the auction-sale, immediately after the sale, and at a time when he cannot be taken to have waived any rights which that transaction may have given him, Mr. Forbes, the appellant, acquired the same rights which he would have acquired had he been the actual purchaser at the revenue sale.

But what are those rights? The first is no longer here disputed. It is that in the case of an auction-purchaser the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction-purchaser is that, for the protection of the revenue, and in order to ensure its due payment by him and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settlor at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right, the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every biga of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the defendants, whose tenures have been questioned by auction-purchasers; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim.

It is, however, to be observed that the course of modern legislation, and, also of modern decision, has, if not in the case of lakhiraj lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the respondents are almost admitted to have given proof of possession for a period of nearly fifty years. But, if they had not done so, this particular case would, in their Lordships' opinion,

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stand clear of the presumptions which the appellant invokes in his favor. For the respondents are claiming these *julkurs*, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the zemindar—a tenure which existed before the date of the perpetual settlement. The question therefore resolves itself into one of parcel or no parcel,—whether the *julkurs* are parcel of the old estate of the under-tenant, or whether they have been granted by an act of the zemindar for the time being subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the appellant from the ordinary rule which the law imposes on a plaintiff,—namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burden of proving that these *julkurs* did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement, lay upon the appellant.

It remains to be considered whether they were also right in holding that he had failed to establish that case. The distinction between the different classes of *julkurs* in dispute has already been noticed; and it may be admitted that although the respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent talook, they would not presumably have the exclusive right of fishing in the waters dividing their lands from those of the appellant, or any right of fishing in places wherein the property in the soil is wholly in the appellant. The proof, however, of the long possession of the respondents applies equally to all the *julkurs* claimed. And that *julkur*, or the right of fishing, may exist in India as an incorporeal hereditament, and a right to be exercised upon the land of another, is shown by the case of *Lukhee Dasee v. Khatima Beebee* (1). In that case A had purchased at a public sale by the Collector the *julkur* of certain *jhils*. One of them became dry, and it was determined that A's

(1) 2 Sel. Rep., 51.

purchase of the *julkur* only did not convey any property in the lands which belonged to the proprietor of the *jhil*. But the *julkur* was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser. The case went through all the Courts, and was ultimately decided by high authority; for it was decided by the Sudder Court with the concurrence of Mr. Colebrooke.

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Again, the issue to be established by the appellant was purely one of fact. It was first tried by the Principal Sudder Ameen who dismissed the suit, and found in favor of the respondents, and that after a local investigation. The cause then went by appeal to the High Court. The High Court thought that some further light might be thrown upon the question by the production of certain documentary evidence, and remanded the suit for re-trial on that ground. It was re-tried, and the Principal Sudder Ameen again found in favor of the respondents. There was then a second appeal to the High Court, and both the learned Judges, who formed the Division Bench of the High Court, thought that there was no ground for disturbing the decision of the Principal Sudder Ameen. Therefore, there has been a complete concurrence of all the Courts which have dealt with this case in India in favor of the respondents, and against the contention of the appellant. It has been urged, however, upon their Lordships that the High Court in particular has mistaken the effect of two documents,—namely, a copy of the quinquennial register and the return of the *sarbarahkar* during the time in which the Perguuna Havili or Sultanpore was in the custody of the Court of Wards. But it appears to their Lordships that the learned Judges of the Court below addressed their minds to those two documents, and were satisfied that they failed to establish the appellant's case. The learned Judges in India are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the Collectorate. Their Lordships do not deny that there may be found here and there a name in those documents, which raises some doubt whether the *julkur* of Seetadhar may not have been returned as part of the assets of the zemindari; but, considering what confusion there often

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is in the nomenclature of villages and other localities in India, their Lordships think that, even if the authority of the documents were upheld, they would not conclusively prove that the plaintiff was entitled to any of the *julkurs* claimed in this suit. It is quite clear that there is considerable confusion as to the *julkurs* belonging to the estate, since the plaint originally included *julkurs* which were afterwards found and admitted to be in the appellant's possession.

On the whole, their Lordships have come to the conclusion that, if they were to reverse the repeated decisions in favor of the respondents, they would be departing, without any reason, from the rule which they have prescribed to themselves respecting concurrent findings of the Indian Courts upon questions of fact, and that therefore the decree ought to be affirmed. Their Lordships also desire to state, through me, that they come to this conclusion the more readily, because they observe that when this Board granted special leave to appeal, in the year 1866, it did so upon the representation (and without that representation it seems very doubtful whether it ever would have done so) that this case involved a question of great public importance, and of general application,—a representation which, in their Lordships' opinion, the argument at the bar has entirely failed to support.

Their Lordships therefore will humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal, with costs.

Appeal dismissed.

Agents for appellant: Messrs. *Burton, Yeates, and Hart.*

Agents for respondents: Messrs. *Barrow and Barton.*

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.

GOSSAIN DASS KOONDOO AND ANOTHER (DEPENDANTS) v. SIROO
KOOMAREE DEBIA (PLAINTIFF).*

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Feb'y. 11.

*Limitation—Act XIV of 1859, s. 1, cl. 13 (1)—Joint Family Property—
Burden of Proof.*

A suit to enforce a right to a share of joint family property must be brought within twelve years from the date of the last payment to the plaintiff, or the person through whom he claims, on account of the share; and the onus is on the plaintiff to show possession of the share, or receipt of a payment on account of it, within twelve years. It is not sufficient for the plaintiff to show that the property was joint family property.

THIS was a suit to recover a share of a tank, including the bank and the trees growing thereon, brought by the plaintiff as purchaser at a sale in execution of a decree against one Hullodhur Koondoo. It appeared that the tank in question had originally been the joint property of Hullodhur Koondoo and his six brothers, but, as was alleged by the defendants, Hullodhur and another brother had given up their share in it in consideration of receiving another tank, and the remaining five brothers thenceforth continued to be joint owners of the tank in suit. The plaintiff, on the other hand, stated that Hullodhur had remained in possession up to the date of his death, ten years previous to the institution of the suit, and that since his death his widow, Rohinee, had continued in possession of his share.

The Munsif recorded two issues: first, whether the hearing of the suit was barred under the law of limitation? Second, whether Hullodhur had any right to and share in the tank, and had been in possession of it?

* Special Appeal, No. 733 of 1872, from a decree passed by the Judge of Zilla Burdwan, dated the 9th February 1872, reversing a decree of the Munsif of Bancoorah, dated the 8th May 1871.

(1) See Act IX of 1871, Sch. ii, No. 127.

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The Munsif in his judgment, after commenting on the evidence in the case, said:—"Thus, it being clear from the evidence of plaintiffs' witnesses that Hullodhur (whose share the plaintiffs claimed as having purchased it at a sale in execution of a decree against him) had no possession of the tank within twelve years, and that the defendants had been all along in such possession, the suit is fully barred by the law of limitation" * * "I cannot but think that the plaintiffs' claim is entirely groundless and out of time, and therefore it is needless to enter into the merits of the case. Consequently I dismiss the suit with costs."

There was then an appeal which was heard by the Judge, and he, after stating the judgment of the Munsif and the grounds of appeal, said:—"There is no proof of the possession of Hullodhur nor of his widow. Hullodhur died ten years ago. Appellants' pleader argues that the presumption is that the seven sons were in joint possession, and the presence of one of them is the presence of them all; and defendants must rebut this presumption. As long as the family remains joint, the possession of one member is the possession of all. And this plaintiff was given formal possession by the Court, and limitation cannot arise. The party alleging that two of the seven sons resigned their share in this tank in consideration of another tank must prove this." He ended his judgment by saying:—"I am of opinion that the possession of the seven brothers was joint. There is no reliable proof of a separation of the brothers, and the presumption amounts to proof that the property was held jointly by the seven brothers. The Munsif has, I think, thrown the *onus probandi* on the wrong party, and not considered the overwhelming presumption of Hullodhur's possession of a seventh share in the tank." He then decreed the suit in favor of the plaintiff and reversed the judgment of the Munsif.

The defendants appealed to the High Court.

Baboo *Bungshee Dhur Sein* for the appellants.—S. 1, cl. 13 of Act XIV of 1859, expressly provides that such a suit as this must be brought within twelve years from the last payment to the person through whom the plaintiff claims. If the suit

is not brought within that time, it must be dismissed as being barred by the law of limitation—*Madhub Dyal v. Punchanun Dyal* (1), *Umbika Churn Sett v. Bhuggobutty Churn Sett* (2), *Bydonath Ojha v. Gopal Mal* (3), *Hurreehur Mookerjee v. Teenhowree Dossee* (4), *Uma Sundari Dasi v. Dwarkanath Roy* (5). The plaintiff in such a case cannot be presumed to have been in possession as Hullothur has been in this case: he must show such possession within twelve years.

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Baboo *Romesh Chunder Mitter* for the respondent.—It has not been shown that Hullothur was out of possession: the family being joint, all the co-sharers must be considered to be in possession. S. 1, cl. 13. of Act XIV of 1859, applies only to a suit brought by one of the members of the family who has been excluded from all participation in the enjoyment of the property or of the income. Hullothur in this case must be held to have been in possession to the time of his death—*Rujoneekant Mitter v. Premchand Bose* (6), *Mussamut Indurmonee Dabca v. Rajnarain Chand Mozoomdar* (7), and *Biressur Banerjee v. Onooda Churn Banerjee* (8).

The judgment of the Court was delivered by

COUCH, C.J. (who, after stating the facts, continued).—The question being whether a suit for the share of one of seven brothers in a tank was barred by the law of limitation, the Judge has held that it was sufficient for the plaintiff who claimed the share to show that Hullothur, whose share she claimed, was one of seven brothers, being a joint family, and that the presumption that the possession of one of them was the possession of all, was sufficient to throw the burden of proof upon the defendant who set up the law of limitation.

It appears that there have been conflicting *dicta*, if not decisions, in this Court upon this matter. In the second edition of Mr. Thomson's Work on the Law of Limitation, published in

(1) W. R., 1864, 349.

(2) 3 W. R., 173.

(3) 6 W. R., 170.

(4) *Ibid.*

(5) 2 B. L. R., A. C., 284.

(6) 1 Hay, 513.

(7) Marsh., 172.

(8) 3 W. R., 12.

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1870, most of the decisions before that time are noticed (1).

There is the *dictum* of the late Chief Justice and L. S. Jackson, J., in *Uma Sundari Dasi v. Dwarkanath Roy* (2).

At p. 289 Sir Barnes Peacock, who delivered the judgment of the Court, says:—"The Judge was probably wrong, as regards the second issue, in throwing the onus upon the defendants, for the plaintiff alleged that his cause of action accrued in Aghran 1266, when the brothers separated in mess; and it appears to us that the onus lay upon the plaintiff (even if the property claimed by the defendants as separate was really joint) to show that he had participated within twelve years in the rents and profits of those estates, and that they had been brought into joint account." Mr. Thomson refers to other cases in which the same opinion has been expressed. I think that in this conflict of authority in this Court, we must see what the language of cl. 13, s. 1 of Act XIV of 1859, is. It provides that "to suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate, on account of such alleged share," shall be applicable. I have read the part of the clause which applies to a share in a joint family property; we need not notice that which refers for the recovery of maintenance.

This clause is clearly intended to apply to cases of joint family property, and it says distinctly that, although it is a joint family property, the suit to enforce the right to a share in it must be brought within twelve years from the date of the last payment to the plaintiff on account of the share. If the law laid down by the Judge were correct, that in such a case it is sufficient for the plaintiff to show that the property is joint family property, this provision in cl. 13 would be practically inoperative, because all that the plaintiff need show is that it is

(1) At p. 180.

(2) 2 B. L. R., A. C., 284.

joint family property. But the clause says that the action must be brought within twelve years from the date of the last payment on account of the share, plainly showing that for the plaintiff to be entitled to sue, there must be something more than the fact of the property being joint; and the possession of one being, therefore, the possession of all, I do not see how effect can be given to this provision of the law without holding that the suit must be brought within twelve years from the date of the last payment on account of the share, where one person is in possession or management of the property, or twelve years from the time of the plaintiff's being in possession of his share: for I agree that it was not intended to bar the plaintiff's right of action where he had been in possession of his share in any way within twelve years. If he is in possession of his share, there can be no payment to him by another person on account of his share. The language of the section clearly shows that it was not intended to prevent the plaintiff from bringing his suit, where he had been in possession within twelve years.

But then comes the question on which party is the onus of showing possession or not of the share within twelve years, or receipt or not of a payment from the person in the possession or management of the property within twelve years.

I think that in deciding upon which party the burden of proof is under this section, we must be guided by what has been held in cases under cl. 12. In these it has been settled that the plaintiff must show that he or some one through whom he claims has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come in within twelve years from the time when his cause of action arose—the time when he was dispossessed. It is not enough for him to prove his title to the property which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation, by proving when the plaintiff was last in possession. It has been considered, looking at the way in which the law of limitation is framed, that the plaintiff is bound to give evidence of that kind.

If we apply that rule to cl. 13, it will be incumbent on

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the plaintiff to show that it is a suit not barred by the law of limitation; that he has had possession of the share within twelve years, or received payments on account of it within that time.

Therefore the decision of the Judge that the burden of proof was not on the plaintiff, but on the defendant, is wrong, and must be reversed, and the case must be remanded to him for re-trial.

Appeal allowed.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

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SOORJO COOMAR SURMA ROY (DECREE-HOLDER) v. KRISHTO
 .. COOMAR CHOWDHRY (ONE OF THE JUDGMENT-DEBTORS).^{*}

*Special Appeal—Act VIII of 1859, s. 387 (1)—Act XLIII of 1860—
 Act XXIII of 1861, ss. 27 & 44.*

No special appeal lies in a suit of a nature cognizable by a Small Cause Court, although the suit may have been instituted before Act XXIII of 1861 came into operation.

THIS suit, which was instituted before Act XXIII of 1861 came into operation, was brought against the respondent and others as heirs and representatives of one Opoorba Chowdhranee, deceased, to recover a sum of money due by her upon a bond. The defendants admitted that they were her heirs, but denied that they had received any property or assets from her. A decree was passed in favor of the plaintiff, but it was declared that the estate of the deceased alone should be liable for the amount, and it was held that the plaintiff had been unable to prove that the defendants had inherited any estate from Opoorba Chowdhranee. The suit was accordingly dismissed with costs as against the defendants.

* Miscellaneous Special Appeal, No. 82, of 1870 from an order of the Officiating Judge of Zilla Mymensingh, dated the 9th December 1869, affirming an order of the Munsif of Chaunki Sherepore, dated the 26th August 1868.

(1) This section was repealed by Act XIV of 1870, which was passed on 5th April of that year.

The plaintiff subsequently sought to obtain execution of his decree against the same defendants on the ground that he could now prove that they held property which belonged to Opoorba Chowdhranee. The Judge of Mymensingh, concurring with the first Court, held that the decree-holder could not, under the terms of the decree, execute it against the defendants. The plaintiff preferred a special appeal which came on before E. Jackson and Mitter, JJ.

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The pleader for the respondent took a preliminary objection that the suit being admittedly one of a nature cognizable by a Small Cause Court, the appeal was barred by s. 27, Act XXIII of 1861. For the appellant, on the other hand, it was contended that, as the suit was instituted before Act XXIII of 1861 came into operation, and as it is enacted by s. 44 of Act XXIII of 1861 that the Act is to be read and taken as part of Act VIII of 1859, and by s. 387 of Act VIII of 1859, that in the case of suits pending when the Act came into operation, no provision of the Act shall be allowed to take away any right of appeal which but for the Act would have existed, therefore the right of special appeal in the present case was not taken away by Act XXIII of 1861, s. 27.

The learned Judges considered that, as the suit had been instituted before Act XXIII of 1861 had come into operation, the plaintiff could not be deprived of his right of appeal which existed before the Act. But as there had been a different ruling on the same question in a previous case by L. S. Jackson and Hobhouse, JJ. (1), they referred to a Full Bench the question whether, under the circumstances of the case, a special appeal would lie.

The question was referred with the following observations by the learned Judges:—

E. JACKSON, J.—We are of opinion that the contention of the special appellant's pleaders is correct; that the terms of s. 387, Act VIII of 1859, must be read with the different clauses of Act XXIII of 1861, as if Act XXIII of 1861 was a part of

(1) *Joogul Kishore Singh v. Oogur Ram Jadub Chatterjee v. Rash Monee Narain Singh*, 8 W. R., 483; see also *Dossee*, 8 W. R., 321.

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Act VIII of 1859; that the words "pending at the time this Act shall come into operation" would, in connexion with the sections of Act XXIII of 1861, be the date at which Act XXIII of 1861 came into operation; that as this suit was instituted prior to that date, the special appellant is not deprived of the right to institute a special appeal, which he would have had according to the law in force before Act XXIII of 1861 came into force, and that consequently we should admit this special appeal.

We find however that a Division Bench of this Court, L. S. Jackson and Sir C. P. Hobhouse, JJ., have held to a contrary effect. There being therefore a difference of opinion, we refer the point for the decision of a Full Bench of this Court.

MITTER, J.—I concur in the order proposed by my learned colleague.

It is admitted on all sides that the suit out of which this special appeal has arisen was actually pending in the lower Court at the time when Act XXIII of 1861 came into operation. It is therefore clear that the special appellant would have been fully entitled to maintain this special appeal if that Act had not been passed. But the question is, has this right been taken away from him by the provisions of s. 27, Act XXIII of 1861? I am of opinion that this question ought to be answered in the negative. Act XXIII of 1861 is called an Act to amend Act VIII of 1859, and the 44th section of that Act expressly provides that it should be "read and taken" as part of Act VIII of 1859. If then we "read and take" Act XXIII of 1861 as part of Act VIII of 1859, the proviso contained in s. 387 of the latter Act would stand just as much in the way of our applying the provisions of Act XXIII of 1861, as in that of our applying the provisions of Act VIII of 1859 as it was originally framed. It is true that the words "in any suit pending at the time when this Act shall come into operation," were originally intended to apply to suits pending on the 1st of July 1859, when Act VIII of 1859 came into operation; but a wider signification must be given to those words now that we are obliged to "read and take" Act XXIII of 1861 as part of Act VIII of 1859. In fact, the new Act

thus constituted must be considered as consisting of two parts; one of which came into operation on the 1st of July 1859, the other on the 28th of August 1861, when Act XXIII of 1861 was passed. Such being the case, the provisions of s. 27, Act XXIII of 1861, cannot be permitted to deprive the special appellant of his right to appeal specially to this court—a right which he could have undoubtedly exercised but for the passing of that section. This view of s. 387 of Act VIII of 1859 is fully borne out by the general rule of construction which forbids the Court to give a retrospective operation to a legislative enactment, when the Legislature itself has not clearly expressed its intention that such operation should be given to it.

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Baboo *Hurry Mohun Chuckerbutty* for the appellant.

Baboo *Anund Chunder Ghosal* for the respondent.

The judgment of the Full Bench was delivered by

COUGH, C.J.—We think it quite clear that no special appeal lies in this case. S. 27, Act XXIII of 1861, expressly says that in a suit of this nature no special appeal shall lie from a decision which shall be passed on regular appeal after the passing of that Act. This is not only a law of procedure which would govern existing suits, but by its terms it applies to decisions or orders which are made after the passing of the Act; and unless this section is controlled by s. 387 of Act VIII of 1859, there is no right of special appeal. S. 387 (which we may read as forming a part of Act XXIII of 1861, as s. 44 says that that Act shall be read and taken as part of Act VIII of 1859) is, that no application of any provision of that Act is to deprive a party of any right, whether of appeal or otherwise, which but for the passing of the Act would have belonged to him. Now, was there a right of special appeal belonging to the applicant in this case, which he would have had but for the passing of Act XXIII of 1861? There certainly was not. By Act XLIII of 1860, he had no right of special appeal; and instead of there being a right of special appeal which belonged to him but for the passing of Act XXIII of 1861, it was the passing of that Act which is said to have given him the right of special appeal. If Act XXIII of 1861 had not been passed,

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and Act XLIII of 1860 had not been repealed, he would have had no right, and could not claim the benefit of s. 387. He had no right of special appeal during the existence of Act XLIII of 1860; and as at the very moment that that Act was repealed, the other Act also took away the right of special appeal, there was no intermediate period of time during which he had a right of special appeal to which s. 387 could be applicable. He was not deprived of anything which belonged, or would have belonged, to him but for the passing of Act XXIII of 1861. The authority quoted from Dwaris on Statutes has no application to a question of this kind, which depends on the construction of the several sections of the Acts, and has to be decided by a reference to them, and not by any general rule. If a Statute which creates an offence, and makes it punishable in a certain way, is repealed, and a new Statute passed with a new penalty for the same offence, the offence committed during the existence of the old Statute cannot be punished under it, as it is no longer the law, nor, unless it is specially provided for, can it be punished under the new Statute. That is a quite different question from the one now before us. I think it is clear that, if Act XLIII of 1860 had been brought to the notice of the learned Judges who referred the question, they would not have referred it; because their judgments show that the foundation of the reference was an opinion on their part that, at the time when Act XXIII came into force, the petitioner had a right of special appeal. E. Jackson, J., says:—"As this suit was instituted prior to that date," that is, when Act XXIII came into operation, "the special appellant was not deprived of the right to institute a special appeal, which he would have had according to the law in force before Act XXIII of 1861 came into force." Mitter, J., in the same way, says:—"It is, therefore, clear that the special appellant would have been fully entitled to maintain this special appeal if that Act," viz., Act XXIII of 1861, "had not been passed." This was certainly an oversight of the learned Judges. It is clear to me that, if the state of the law as regards the special appeal had been present to their minds, they would have come to the same conclusion at which we now arrive.

The special appeal must be rejected with costs.

PRIVY COUNCIL.

RAMCHUNDER DUTT (DEFENDANT) v. JUGHESCHUNDER DUTT,
 HEIR OF ROMESHCHUNDER DUTT (PLAINTIFF).

P. C.
 1873
 March 22
 & 25.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Enhancement—Ryoti Kadimi Tenure—Regulation VIII of 1793, s. 51—
 Regulation V of 1812, s. 10—Service of Notice of Enhancement.*

Where a zemindar, a purchaser from a mortgagee, sued to enhance the rent of lands (part of the purchased zemindari) which were held on a *ryoti kadimi* tenure, which had existed more than twelve years before the decennial settlement, but the holder of which had subsequently accepted a potta from the zemindar, *Held*, the acceptance of such potta did not debar the tenant from the right of exemption from enhancement to which he was entitled by reason of the nature of his tenure. Such a potta may be confirmatory only, and is not inconsistent with the presumption that a prior title existed (1).

Semble.—A claim to exempt a tenure from enhancement on the ground that it is a *ryoti kadimi* tenure does not fall within Regulation VIII of 1793, s. 51.

Where substituted service is resorted to under Regulation V of 1812, s. 10, the Courts should take care to be first satisfied that the person who ought to be served personally is keeping out of the way.

APPEAL from a decree of the High Court (Steer and E. Jackson, JJ.) dated the 6th February 1865 (2).

This was a suit brought by the respondent, under the provisions of Regulation V of 1812, to enhance the appellant's tenure. The suit was instituted in the Court of the Principal Sudder Ameen of the 24-Pergunnas on 9th June 1859, previously to Act X of 1859 coming into operation. The plaintiff purchased the zemindari right to the lands in suit at a sale in execution of a decree of the Supreme Court of Calcutta in December 1856. He alleged that on the 7th Jaishta 1266, or May 1859, after getting possession of his purchase, he served a notice on

Present :—RIGHT HON'BLE SIR JAMES COLVILLE, SIR BARNES PHACOCK, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

(1) See *Baradakant Roy v. Chundra Kumar Roy*, 2 B. L. R., P. C., 1.

(2) 2 W. R., Act X Rul., 47.

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the appellant under Regulation V of 1812, ss. 9 and 10, to attend at the zemindari cutcherry, and take a potta and give a kabuliat for the lands in suit which were in appellant's possession, at certain rates mentioned in the notice; but the appellant failed to do so.

The defence to the suit was:—1st, that in June 1830 the appellant had received from the then zemindar of the lands in suit a registered *ikrar* and an unregistered potta fixing the rent, by which the respondent, as a private purchaser, was bound; 2ndly, that there was no proof of service of notice to enhance; and, 3rdly, that the lands had been held by the appellant on a *hadimi ryoti* tenure which had existed more than twelve years before the decennial settlement, and which was confirmed by the above-mentioned potta. The Principal Sudder Ameen, on the 29th June 1863, decided in favor of the respondent, but as he held that there was no proof of service of notice, he directed the lands to be assessed at enhanced rates from the date of his decree. The Judge on appeal, on the 18th June 1864, affirmed the enhanced assessment, but directed it to run from the date of suit, holding that the notice of enhancement had been duly served.

This judgment was affirmed on special appeal by a Division Bench of the High Court (Steer and E. Jackson, JJ.) on the 6th February 1865, and an application for review of their judgment was rejected in June of the same year. The High Court held that the appellant having put forward the potta as the ground of his title could not afterwards fall back on his ancient tenure.

The defendant appealed to Her Majesty in Council.

Mr. Leith, Q.C. (Mr. J. H. W. Arathoon with him), for the appellant, referred to Regulation VIII of 1793, s. 51 (1), and

(1) *Regulation VIII of 1793 s. 51*:—"The following rules are prescribed to prevent undue exactions from the dependent talookdars:—*First*, No zemindar or other actual proprietor of land shall demand an increase from the talookdars dependent on him, although he should himself be subject to the payment of an increase of *jama* to Government; except upon proof that he is entitled so to do, either by the special custom of the district, or, by the conditions under which the talookdar holds his tenure,

contended that it lay upon the respondent to bring his case within some of the conditions mentioned therein in order to prove a liability to enhancement; that the appellant had sufficiently proved his ancient tenure, and was not precluded from the benefit thereof by reason of subsequently obtaining a confirmatory potta; and that no notice to enhance had been personally served as required by Regulation V of 1812, s. 10.

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Mr. Cowie, Q.C., and Mr. Doyne, for the respondent, contended that it lay upon the appellant to prove that he held by a tenure which was exempt from enhancement; and that such proof was not afforded either by the *ikrar* or the potta, which latter had been found by both Courts in India to be spurious, or by any evidence anterior to those documents.

The judgment of their LORDSHIPS was delivered by

SIR M. E. SMITH.—This was a suit brought by Romesh Chunder Dutt, who claimed to be the zemindar of a zemindari called Lot Porooe, his title resting upon a purchase at a sale by a Master of the late Supreme Court, under a decree by which the zemindari was ordered to be sold in a suit by the mortgagee. The present suit was brought to enhance the rent of the appellant, treating his tenure as one in which the rent was enhanceable. Romesh Chunder Dutt, as purchaser at the sale to which reference has been made, can have no higher title to enhance the rent than he would have had if he had been a purchaser from the former zemindar. The sale was not for Government revenue, and the title of the purchaser under it was no higher or better than it would have been under a

or that the talookdar, by receiving abatements from his *jama*, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it.

"Second, If, in any instance, it be proved that a zemindar, or other

actual proprietor of land, exacts more from a talookdar than he has a right to, the Court shall adjudge him to pay a penalty of double the amount of such exaction, with all costs of suit, to the party injured."

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conveyance direct from the zemindar. Therefore, the question comes to this, whether the respondent, as zemindar, had, as against the defendant in the suit, the right to enhance the rent.

The defence made to the suit is, first, that there was no notice to enhance, upon which some observations will hereafter be made; but the principal defence is that there was no right to enhance, based upon the contention that the lands of the defendant were held on *kadimi ryoti* tenure. It was further alleged that that tenure had been confirmed by a former zemindar by the grant of a potta which, as it was said on the part of the defendant, was confirmatory only, and not a new grant. But the foundation of the case which has been put forward to exempt this land from an enhanced rent is that it was held on a *kadimi* tenure which had existed more than twelve years before the decennial settlement.

The first question which arises is upon whom the onus of proof lies? Mr. Cowie contended that upon the general principle running through the relations of landlord and tenant in Bengal, the liability to enhancement was the rule, and that those who sought to escape enhancement must prove their exemption. On the other hand, it was said by Mr. Leith that this case fell within s. 51 of Régulation VIII of 1793, and that it lay upon the zemindar to bring the case within some of the conditions mentioned in that section. Their Lordships are disposed to think that this claim to exemption, being rested upon the ground that the tenure was a *ryoti kadimi* tenure, does not fall within the 51st section, which relates to dependent talookdars, properly so called; and they are not prepared to affirm what was said by the Judges in the case to which reference has been made—*Rajkishen Roy v. Bydonath Nundee* (1). It is there stated:—"We think the analogy of the law, s. 51, extends to *kadimi* ryots, which the defendants are." Now, arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a Statute, reasons founded upon analogies are scarcely applicable. However, assuming in this case that it lay upon the defendant in the suit to establish his claim to exemption,

their Lordships have come to the conclusion that he has sustained the burden of proof cast upon him, and established a case which entitles him to be exempted from enhancement.

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The earliest evidence which has been given is the proof of certain receipts for rent, of a date as long ago as the year 1771. There are receipts of that year which show that some of these lands were held by ryots at that date, paying the identical rent which has ever since been paid—that is, upwards of a century. These receipts, however, cover a part only of the lands in question, viz., the lands in Bashoodebpore; and there are lands in three other mauzas which are not included within them. With regard, however, to these lands they are all included in a *jamabandi* made as early as the year 1783; apparently for the purposes of the decennial settlement, which took place about 1790. That *jamabandi*, made seven years only before the decennial settlement, may not be sufficient in itself; it does not afford direct evidence in itself to satisfy the requirements of the law, that to escape enhancement there should have been a fixed rent for more than twelve years before the decennial settlement. But at the distance of time at which we are now arrived from the date of that settlement, it becomes absolutely necessary, for the purposes of justice and equity, that presumptions should be made. It may be, that the *jamabandi* alone would be insufficient to found a presumption that these tenures were ancient tenures, and that this rent had existed for twelve years before the decennial settlement. But this case does not rest upon the *jamabandi* alone. The subsequent evidence which has been given in the cause, supports very strongly the presumption that these tenures were ancient at the time of the settlement; how ancient, it is impossible to say. It seems that the lands now held by the defendant had been divided into small jotes or holdings, and had been held by numerous tenants, whose names are found in the old receipts and the *jamabandi* to which reference has been made, and the rents there appearing are the same which have ever since been paid. These tenants from time to time sold their jotes, and they were purchased by a gentleman of the name of Tara Chand Bundhopadhya, to the extent of 236 bigas. Tara Chand

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having thus acquired the property, sold it to those under whom the present defendant claims, and at the time of that sale some transactions took place between Tara Chand and the purchaser, to which the zemindar was a party. Their Lordships are of opinion that those transactions in the strongest way confirm the presumption that the lands at that time were held under an old tenure.

It appears that Eshan Chunder Chuttopadhya, who was then the zemindar, had become surety for Tara Chand, and that in order to relieve himself from the consequences, and also to obtain payment of Rs. 1,000 which Tara Chand owed to him, he became "the medium," as he himself says in his *ikrar*, of the sale from Tara Chand to Ram Chunder Dutt. But before that sale took place, there were some disputes respecting the property and the rent; and it was to show his acquiescence in the sale, and to prove that all those disputes were at an end, that Eshan Chunder, the zemindar, gave an *ikrar* or agreement to Ram Chunder Dutt, the purchaser.

This *ikrar* bears date the 27th Magh. 1238 (8th February 1832); it was registered on the 25th November 1832; and its terms are most important. The zemindar refers to his having given security, and that Ram Chunder Dutt had become the purchaser of the tenures by ten deeds of sale for a consideration of Rs. 10,078; that he had himself obtained Rs. 1,000 in satisfaction of the money due to him, and had been relieved from the liability which he was under as surety of Tara Chand. Then the most important part follows. The *ikrar* says:—"But a dispute about mutation of names having arisen between you and ourselves, you filed a petition against us in the Civil Court of Zilla 'Hawali Shahr' (suburbs of the town of) Calcutta, and a *perwanna* was issued calling for an answer from us. Thereupon we gave a potta to you, after settling the rents according to the *jamabandi*, by mutation of names." When the zemindar refers to settling the rent according to the *jamabandi*, he was aware of the conveyances which had been made by Tara Chand to Ram Chunder; conveyances which describe not an ordinary holding of a ryot, but something much more,—a tenure which was of value, and hereditary.

The deeds of sale are set out, and are all substantially to the same effect. In the part which relates to the sale there are these words:—"I sell to you the said lands for a consideration of Rs. 2,255, which have been received by me in full and in cash. You taking possession of these lands in the manner held by me, and causing your name to be entered in the zemindar's *sarrishta* by expunging my name, and paying the rents according to the *jamabandi*, continue to enjoy them happily, heir after heir. The power to sell those lands, or give away in gift, rests with you." These were deeds to which the zemindar was privy. He was, therefore, aware that the sale was of a tenure which was to be held by the purchaser and his heirs, heir after heir, at rents according to the *jamabandi*; not any new rents, but rents according to the *jamabandi* of 1783, under which the decennial settlement had been made. Now, with the knowledge of those conveyances, the zemindar, in his *ikrar*, says this:—"Thereupon we gave a potta to you, after settling the rents according to the *jamabandi* by mutation of names." Why should he have acceded, in the year 1831, to a settlement of rents according to the old *jamabandi* of 1783, if there had been at that time a power on his part to enhance? A very long time had elapsed since the settlement, and it can hardly be supposed that the value of the lands had remained the same. There is also the strong fact, which was brought to his knowledge, that the large sum of upwards of Rs. 10,000 had been given for these very lands, which, upon the hypothesis of the respondent, must have been immediately afterwards enhanceable by the zemindar himself.

Their Lordships think the above transaction, evidenced by the *ikrar* and the deeds of sale, affords very strong evidence of an acknowledgment on the part of the zemindar that the lands were held as ancient tenures. Reference is made by this *ikrar* to a potta; and there can be no doubt that a potta of some kind was executed at that time by the zemindar. Well, the appellant has produced a potta which, he says, is that which was granted, and on the face of it, it certainly accords with the *ikrar*, and with the rest of the evidence in the case; and if this be an old tenure, this potta is entirely consistent with it. Con-

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firmatory pottas are common in India; and this potta, if it really was made in the terms of that produced by the appellant, must be taken to be confirmatory of the tenure which then existed.

But it was said that this potta is not genuine, and undoubtedly the Courts below, the Principal Sudder Ameen and the Zilla Judge, have so found. It is not usual, and certainly it is not the desire of their Lordships, to interfere with the concurrent findings of the Courts below upon a question of fact, where the case depends entirely upon such a question; but where it becomes necessary, in the course of an appeal involving other questions, for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular document is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the appeal. Their Lordships desire to say with regard to this potta that they are not fully satisfied with the reasons on which it was rejected by the Courts below. They cannot but think that great weight is due to the evidence of the zemindar, Eshan Chunder; for although he was unable from his blindness to see the document, yet when it was read over to him, he gave, without hesitation, his opinion that it was the potta he had granted. It was an important potta, not likely to have escaped his recollection; and whether he recollected all the terms of it or not is immaterial, when he had the impression on his mind, if he is speaking the truth, that he had granted a confirmatory potta of the *maurasi* rights of the tenants. However, their Lordships are of opinion that, even without the potta, the evidence is sufficient to support the contention on the part of the appellant, namely, that these were old tenures in the nature of *kadimi* tenures existing more than twelve years before the decennial settlement, and therefore not liable to enhancement on the part of the zemindar.

With regard to the 26 bigas not included in the deeds of sale from Tara Chand, their Lordships think that the evidence proves, without the aid of these deeds, that they were *kadimi* tenures of the same nature as those on which the larger quantity was held.

With regard to the judgment on the special appeal, their Lordships find that the High Court did not go into the evidence to ascertain whether there was an ancient tenure, which might establish freedom from enhancement, although the potta, which the Courts below had declared not to be proved, had never existed. No doubt, the High Court was limited on the special appeal to the consideration of the law; they were obliged to assume that the potta, which had been found not to be genuine, was a document which could confer no title. But they appear to have founded their judgment upon the assumption either that the case had been put upon the potta, and that no other case had been made, or that Ram Chunder Dutt by accepting a potta had, as it were, attorned to the zemindar under that potta, and acknowledged that he had no older title. Their Lordships think that is not the correct view. They have already said that in their opinion a potta may be a confirmatory grant only, and that there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed. It seems to have scarcely been a sufficient reason for not going into the early title that Ram Chunder Dutt had taken a potta, the terms of which the High Court were unable to ascertain.

Upon these grounds their Lordships think that the judgments of the Courts below must be reversed.

The conclusion at which their Lordships have arrived upon the right to enhance, renders it unnecessary to determine whether the notice was properly served or not. It appears that the Principal Sudder Ameen and Zilla Judge differed upon that point, the first Judge finding that the notice was not well served, the second that it was. Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice was properly served. If it had been necessary to determine that point, the evidence must have been narrowly looked at to see if any presumption could have been raised that Ram Chunder Dutt was keeping out of the way at the time that it was attached to his door. Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the Statute requires wherever it is practicable, the Courts should take care to be

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satisfied that the condition, on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court.

In the result their Lordships will humbly advise Her Majesty to reverse the decrees of the Courts below, and to direct that the suit should be dismissed, and that the appellant should have his costs in the Courts in India and of this appeal.

Appeal allowed.

Agent for the appellant: Mr. *Wilson*.

Agents for the respondent: Messrs. *Barrow and Barton*.

* P. C.
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RAJA PIRTHEE SINGH (DEPNDANT) v. RANI RAJKOOR *alias*
 RANI SIBCOWAR (PLAINTIFF.)

[On appeal from the High Court of Judicature, North-Western Provinces.]

Hindu Law—Widow—Maintenance—Residence—Unchastity.

A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity, or for any other improper purpose.

Arrears of maintenance may be awarded.

THIS suit was brought in the Court of the Subordinate Judge of Agra, in November 1868, by the respondent, the fourth widow of Raja Petumber Singh, against her late husband's adopted son, who was also his sole heir and the general devisee and administrator under his will. She claimed Rs. 23,000 as arrears of maintenance, and also future maintenance

* *Present* :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR MONTAGUE E. SMITH,
 AND SIR ROBERT P. COLLIER.

at the rate of Rs. 250 per mensem; the husband's property being estimated at two lakhs a year. The claim was based on the general Hindu law, and also upon the terms of the husband's will, which however did not specify any amount for maintenance, but merely directed that the Ranis should be supplied after his death, as formerly, with necessary provision for life and all other expenses, such as charities, which it was directed should be rather increased than diminished. The Raja died in 1845. The manager under his will fixed and continuously paid Rs. 150 a month as maintenance-money to each of the four Ranis. The appellant, when he came of age, in 1853, confirmed that arrangement. But in 1861, the respondent quitted her late husband's family house, and went to reside with certain relatives of her own, and for seven years thereafter received no maintenance either from the appellant or from her husband's estate.

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The defence was, that in so quitting the family house, the respondent acted contrary to the provisions and intention of the will and to the family custom. The will, however, was silent on the point of residence, though it directed that the Ranis should be treated with observance and respect. Charges of unchastity were made by the appellant, but were subsequently abandoned. The Subordinate Judge by his decree in the suit in December 1869 fixed the rate of maintenance at Rs. 150 a month, and provided accordingly both for arrears and for future maintenance. The High Court (Turner, C.J., and Spankie, J.), on the 4th May 1870, affirmed that decree, fixing however Rs. 200 as the proper rate at which the maintenance should be assessed (1).

The defendant appealed to Her Majesty in Council.

Mr. Leith, Q.C. (Mr. J. Aratloon with him), for the appellant, contended *inter alia* that there was not on the evidence any justification for the respondent leaving her husband's house, and that such act was a violation of her duty as a Hindu widow, and barred her right to maintenance; see Colebrooke's Digest, Bk. v, v. 481; 1 Macnaghten's Hindu Law, p. 104; Elberling, s. 167, p. 75; Dayakrama Sangraha, Ch. i, s. 2, v. 4; Sir F. Macnaghten's Cons. of Hindu Law, p. 62.

(1) 2 Allahabad H. C., 170.

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Mr. Grady, for the respondent, contended that, notwithstanding her departure from her husband's house, she had a charge upon his estate for her maintenance-allowance and other expenses. He cited *Cossinauth Bysack v. Hurrooondery Dossee* (1), *Oma Debea v. Kishen Munee Debea* (2), and *Seebosunderree Dossee v. Kistokissore Neoghy* (3), in which case it was referred to the Master to settle the account of maintenance from the husband's death, *Jadumani Dossee v. Kheytramohan Shil* (4), a decision which proceeded upon a judgment of the Privy Council, and the opinion of the pundits in the case first cited, *The Ramnad case* (5), and *Shurno Moyee Dassee v. Gopal Lall Doss* (6); and Shamachurn Sircar's *Vyavastha Darpana* (2nd Edit., pp. 45, 46, 47.)

The judgment of their LORDSHIPS was delivered by

SIR B. PEACOCK.—This was a suit brought by Rani Rajkooer against Raja Pirthee Singh to recover arrears of maintenance, and also to have a decree for future maintenance. Raja Pirthee Singh was the adopted son of Raja Petumber Singh, and the plaintiff was the fourth or youngest of the four widows left by the late Raja. The Subordinate Judge gave a decree in favor of the plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to Her Majesty in Council, which we now have to consider.

The defence set up by the adopted son was that the plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says—"The defendant provided the plaintiff with maintenance so long as she remained in Ava" (that was the family house), "according to the family custom. In 1861, the plaintiff, disregarding her husband's honor, left for Kotah with Bholanath, contrary to the terms of the will and the family custom, and became an abandoned character.

(1) 2 Morl. Dig., 198; and in the (3) 2 Tay. & Bell, 190.
 P. O., Clarke's Add. Ca., 91, and (4) Vyavastha Darpana, 384.
 Morton's Rep., 85. (5) 12 Moore's I. A., 397.
 (2) 7 Sel. Rep., 270. (6) Marsh., 497.

This being so, she has lost her right. Even after this the defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let Bholanath have any access to her, allowed her lodgings at Durriyapur, and regularly took care of her maintenance. The plaintiff's claim for maintenance prior to the institution of the suit is therefore illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The plaintiff has nevertheless not parted with Bholanath, *i.e.*, she has continued to act and behave contrary to her promise, disregarding the honor and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindu law to have a maintenance fixed for her for the future." Now, that defence on the part of the defendant has not been proved, and has been very properly given up. The plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the residence of her late husband any more than the defendant has made out his defence. The question, therefore, comes to this,—whether a Hindu widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by *Cossinauth Bysack v. Hurrosoondery Dossee* (1) which was tried in the Supreme Court in Calcutta, in which the Chief Justice, Sir Edward Hyde East, gave judgment. The question was put to the pundits, whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir Edward Hyde East says:—"Upon the last ground of error the pundits have uniformly answered that the widow was not bound to live with her husband's relatives. The eighth question put by the Court to their pundits was:—If a widow from a just

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(1) 2 Morl. Dig., 198; and in the P. C., Clarke's Add. Ca., 91, and Morton's Rep., 85.

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cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate? *A.* If a widow, from any other cause but for unchaste purposes, cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited." He certainly goes on to say: "Here there was a good cause at the time, namely, the extreme youth of the wife, and no pretence was made of the prohibited cause." It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to Her Majesty in Council, and was decided on the 24th June 1826. The opinion of the Judicial Committee was delivered by Lord Gifford. He says:—"With respect to the last supposed ground of error in this decree which was assigned by the appellants, namely, that it was not ordered by either of the decrees that Hurrosoondery Dossee should reside with, or under the care, protection, and guardianship of the appellants, who, as the surviving brothers of Bissonauth Bysack, were alone entitled to have the care, protection, and guardianship of his widow, the pundits appeared to be unanimous in the opinion that a Hindu widow is not bound to live with her husband's relatives." That is the principle laid down. Then says his Lordship:—"I will read the answer to the eighth question put, which will explain what the Hindu law is upon the subject, and in that it appears the other pundits who were called in agreed, or at least they expressed no objection to the opinion pronounced. The question put is this:—'If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' The answer is:—'If a widow, from any other cause but unchaste purposes, ceases to reside in her husband's family, and takes up her abode in the family of her parents, her rights would not be forfeited.' " Then his Lordship goes on to say:—"Now, it was not pretended in this case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of fourteen years at the death of her husband. His brothers were young men, and she thought

it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the pundits that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother; and, therefore, there appears to be no foundation to that extent for the appeal." The reasons given, that she was only of the age of fourteen years at the death of her husband, and that his brothers were young men, do not appear to be the reasons upon which that decision was founded. It was merely pointed out, as their Lordships understand the judgment, for the purpose of showing that the widow was not removing from her husband's house for unchaste or improper purposes.

It, therefore, appears that a Hindu widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes.

That decision is quite in accordance with the vyavasthas which are quoted by Shamachurn Sircar in his book called Vyavastha Darpana. At p. 370, Vyavasthas Nos. 199 and 200 are thus stated:—"Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, yet still she is entitled to maintenance. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house." The husband in this case left a will, but he did not impose any condition upon either of his widows to reside in the family house after his death. He wrote a letter to the court, in which he stated that he did not wish that his widow should have the management of his property, and put the same to the hands of a mooktear, because, he said, it was of no use to maintain the reputation of his family. But it is no

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more than any other Hindu gentleman would desire, that after his death his property should not be jeopardized, that the reputation of his widows should be maintained, and that they should not destroy the reputation of his family by destroying the reputation of themselves.

It has been held that the Hindu law does not require a Hindu widow, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives. She does not injure her reputation by living with her own mother or her own father. It is laid down as a rule of law that she is not bound to live with her husband's relatives. The decision of the Privy Council was quite in accordance with those texts of the Hindu law referred to by Shamachurn Sircar.

In the case of Shibasundari Dasi, the widow of Golackchunder, cited in Baboo Shamachurn Sircar's book at page 381, in which Sir Lawrence Peel delivered a judgment, it appeared that Shibasundari Dasi, widow of one Golackchunder, who died during his father Rammohan's lifetime, voluntarily left the family house ("voluntarily," that is to say, without any cause except her own will and desire), and sued the defendants, who were the surviving sons and representatives of the other sons of Rammohan, for separate maintenance: a verbal reference had been made to three respectable Hindus, Kashinath Mallik, Gobindachunder Banerjea, and Rammohan Neoghi, who awarded Rs. 12 per month as sufficient allowance to her, she being allowed apartments in the family house, and food. Sir Lawrence Peel said:—"We think she is entitled to a separate maintenance.

The words 'food and raiment' being too vague and ambiguous an expression, we must refer it to the Master to inquire and report whether the amount offered was just and proper with reference to her situation in life." Then in another case:—"Srimati Mandari Debi, the eldest of the two widows of Tilakram Pal, a Hindu native of Bengal, filed a bill against his son, p. that defendant 'may set forth a full, true, and perfect account of the property, and may be compelled by a decree to pay the same.'" I believe it was not made a question about whether she left the father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of *Jadumani Dossee v. Kheytramohun Shil* (1), in which Sir Lawrence Peel, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir Lawrence Peel must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said:—"The question is, whether a Hindu childless widow, who, some short time after the death of her husband, uncompelled by cruelty or ill usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respect a proper one, and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his lifetime and which had devolved on his heirs." There the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir Lawrence Peel, after referring to some conflicting authorities, said:—"This state of the authorities has induced us to examine closely into the law on the subject. We should not hesitate to follow the decisions of the Sudder in preference to those of our own Court, if they appeared to us to be at once more just and more conformable to the Hindu law. We have intended to follow the Privy Council. The Privy Council has, on the subject of the right of the Hindu widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says:—"It was not pretended that she had withdrawn herself for 'unchaste purposes. She was only fourteen at the death of her husband, her brothers were young men; and she thought it more prudent and decorous to retire from their protection and live with her father and her family after the husband's death, therefore it is quite clear from the answers given by the pundits, that she did not forfeit the right of succession to the husband's estate and of removing from the brothers of her late husband;

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that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother's protection.' The decisions of that Court must of course give the law to all Courts here. The answer of the pundits, which the Privy Council adopts, is, that 'if a widow, from any other cause but unchaste purposes, ceased to reside in her husband's family and took up her abode in her parents' family, her rights are not forfeited.' Then he says :—" In the Privy Council the question was whether the Hindu heiress forfeited her estate, by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the pundits was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow not an heiress, as to one who inherited;" meaning to say, that the rule which had been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes, she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindu law requires the heirs of her husband to provide for her.

We are, therefore, not now deciding the question for the first time. We are not now for the first time laying down a rule upon this subject. In the case of *Shurno Moye Dossee v Gopal Lall Doss* (1), the widow sued for maintenance, and was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said,—“ In this case a widow sues for maintenance. The defendant, who is her step-son, objects that she resides in the house of her father, and alleges that she is, therefore, not entitled to maintenance. The widow alleges that she left the father's

(1) Marsh., 497.

s. 161, 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause if she was directed by her husband to be maintained in the family home.' We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal."

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and is entitled to retain her maintenance, unless she is guilty of adultery, or other disreputable practices, after she leaves

tried by a Subordinate Judge, in this instance, and, therefore, must be acquainted with the religion of Hindus; and he thought that the widow, who was still entitled to her husband's house, was still entitled to her maintenance. He awarded her the sum of Rs. 150 a month, and calculated at that rate for the years during which she was allowed maintenance. The case was then brought to the Court, and that Court thought that, inasmuch as the husband's property, the maintenance was a larger sum; and they awarded her Rs. 200 a month. Their Lordships do not disturb that decision. The amount awarded is in accordance with the Vyavastha 197 in Shamachurn, and with reference to the proprietor's share of the deceased husband left property to

Court (1) in which arrears were awarded; in the case also in which Sir Lawrence Peel gave that elaborate judgment to which I have referred, arrears of maintenance were awarded to the widow, as well as a decree in her favor with regard to future payments.

~~Under these circumstances~~ their Lordships are of opinion that the decision of the High Court is correct, and they therefore humbly recommend Her Majesty that that decision be affirmed, with the costs of this appeal.

Appeal dismissed.

Agent for the appellant: Mr. *Wilson*.

Agents for respondent: Messrs. *Frank, Richards*.

(1) See 2 Mad. H. C.,

Revision—Power of High Court—"Material Error"—
communications.

Where the High Court sent for the record of a case, and therefrom doubtful whether the evidence was sufficient for conviction, the Court refused to interfere, there being no error in law, or in the proceedings, which rendered such interference improper.

PER GLOVER, J.—The power of the High Court is limited to reverses and orders passed by subordinate Courts as distinct from judgments of such Courts, and a judgment cannot be interfered with in cases where the law gives an appeal on the facts, unless it be manifestly contrary to law.

PER GLOVER, J.—The High Court cannot, under s. 294 of Act X of 1859, reverse a conviction, unless there has been some material error in the proceedings, such conviction illegal and improper in law.

The communications between a prosecutor in a criminal case and his counsel, and between the attorney and his clerk, as to the case, are not

... made by one Kally Doss Bonnerjee ...
... Doss, one Toolsee Doss Nundy, and ...
... Doss was arrested, and thereupon ...
... tried the case recorded the prose-
... of Toolsee Doss alone. The ...
... were shortly as follow:—
... come to Calcutta for the pur-
... met the prisoner Toolsee, with ...
... that Toolsee, under pretence of

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; that, after some delay, -- Begum refused to part with the note, or 100, but stated that if the prosecutor would call the following day, he should receive it. When he did call as arranged, he found that the persons had decamped; that he, the prosecutor, in consequence, Nobo Poddar, and one Ghaseeram, how he had been duped, and described the persons who had cheated him, whereupon Ghaseeram guessed their names and that by Ghaseeram's advice he laid a charge against them. That a few days thereafter Ghaseeram told the prosecutor that the accused were anxious to compromise, and offered Rs. 2,000 with some person whom all parties agreed to. The prosecutor suggested Nobo Poddar, and the currency notes were accordingly deposited with Zahoorooddeen; that thereupon the prosecutor called on Zahoorooddeen and one Mahomed Lutif, who were the prosecutor's attorney, and stated that he was ready to withdraw the charge, as he feared he could not prove it; and that Mr. Sims made a statement before the Magistrate of Sealdah in the proceedings, the statement, however, being in English and not in Urdu stand.

The accused Belilios subsequently absconded, and the parties charged absconded.

At the trial before the Deputy Magistrate, Belilios reserved his cross-examination until after the examination of the witnesses, among whom were Nobo Poddar

Code, look into the propriety as well as the legality of the sentence or order passed by, and also the regularity of the proceedings in, the subordinate Courts. By s. 295 the Zilla Court has the power to send for the record of a case, and satisfy itself as to the legality only of the sentence or order passed by a subordinate Court. [GLOVER, J.—If your contention is right, there may be two appeals in every criminal case.] There may be. The powers of revision of the High Court have been increased by the new Criminal Procedure Code. There is a marked distinction between ss. 294 and 295; in the latter there is no mention of “propriety,” and some meaning must be given to that word in s. 294. [PONTIFEX, J.—The propriety of a sentence may refer to the amount of it.] The new Criminal Procedure Code (Act X of 1872) is founded on decisions of the High Courts determining their power, and it is submitted the Legislature did intend to extend the powers of revision of the High Court. The record of the case being now here, the Court under s. 297 can pass such judgment, sentence, or order as it seems fit. [PONTIFEX, J.—There must be a material error which enables the Court to proceed under s. 297, and to direct an appeal.] A failure of justice is a material error, and the Sessions Judge here has prejudiced the prisoner in his defence; the Sessions Judge may as much require that the facts should be ascertained where the lower Court has gone wrong upon the facts as where it has gone wrong in law—*Queen v. Koonjo* (1). The “material error” in s. 297 are “equivalent to a material error” in s. 294—*Queen v. Ramkanu* (2). [PONTI-

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missed a complaint brought by the prisoner without examining certain witnesses called by him, and had ordered him to be prosecuted under s. 211 of the Penal Code. Under this order the prisoner was tried and sentenced to one month's rigorous imprisonment.

The Sessions Judge, being of opinion that the Deputy Magistrate acted illegally in ordering a prosecution, referred the case to the High Court.

Judge of Cuttack.

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FEX, J.—The story told by the prosecutor may seem improbable to us, but it was not so in the opinion of the lower Court.] It is submitted that the question now is what does this Court consider. The order of the Judge here is not more final than an order of a Judge sitting with Assessors, and if in the latter case the verdict was not warranted by the evidence, this Court would set it aside—*Queen v. Elahi Bax* (1); see also *Queen v. Raj-coomar Bose* (2), which was a case tried by a jury. This Court will not uphold a conviction which it thinks is an improper one. The order of the Judge, that the sum of Rs 2,000 deposited with Nobo Poddar should be handed over to the complainant, was made without jurisdiction and should be reversed.

The *Advocate-General* contended that there was no appeal to the High Court from the judgment of the lower Appellate Court. S. 286 of the Criminal Procedure Code says:—"No appeal shall lie from any judgment, sentence, or order of a Criminal Court, except in the cases provided for by this Act."

He stated his opinion, however, that the complaint was a false one; that the prisoner did not distinctly state what the witnesses, who were not called, were expected by him to prove, and that those who were examined gave no reliable evidence in support of the prisoner's complaint, and some of them directly contradicted him.

The judgment of the High Court was delivered by

PHAR, J.—Although, as the Judge points out, there has been error in the proceedings, still it does not seem to be a material error within the meaning of s. 297 of the new Criminal Procedure Code, such as would justify our setting aside the proceedings on the trial and the conviction. For that purpose the error must be material and we think that "material" in s. 297 is equivalent to the effect of s. 286

which says that:—"No finding or sentence passed by a Court of criminal jurisdiction shall be reversed on appeal on account of any defect, either in the proceedings or on account of the admission or rejection of evidence, or misdirection, unless such defect is material."

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by any law for the time being in force." This case comes up under s. 294. Under that section the legality of a sentence or order can be inquired into, but there is no mention of a judgment, and therefore, under that section, the judgment of the lower Appellate Court cannot be inquired into. [PONTIFEX, J.—Having been shown an irregularity, cannot we inquire into the sentence?] That depends on what the irregularity was; here the irregularity complained of was that certain questions were not allowed. The provisions of s. 297 are very stringent. The object of the revision sections is not so much to do justice as to amend irregularities, and that being the case, no person has a right to be heard either personally or by Counsel; see last portion of s. 297. [PONTIFEX, J.—“Material error” in s. 297 may mean an error on which the sentence is founded.] Yes, but here there was no such error. Does a judgment come within the meaning of “a judicial proceeding” mentioned in s. 297? A sentence would be included in those words. [PONTIFEX, J.—“Judicial proceeding” in s. 297 must mean the whole matter; that section gives us power to pass sentence.] “Judicial proceeding” is defined in s. 4, and it is submitted that a judgment is only part of a judicial proceeding. The concluding paragraphs of s. 297 show the effect of the first paragraph, or they are only illustrations of the cases in which this Court will interfere. The cases referred to are appeals from cases tried by juries, and from cases tried by Magistrates. The learned Counsel admitted that the High Court as to the Rs. 2,000 deposited with Nobo was not competent to interfere.

Reply.—As to the argument that the concluding paragraphs of s. 297 limit the first portion of that section, it is submitted that this is not the case. It is shown by the case of *Moonshee Abdool Kadir v. The Collector of Purneah* (1). It is absurd to say that the Court has no power to call for the record of a case, and then to say that it has no power to interfere if it thinks fit, but an order or judgment may be made if it is thought proper, and of which

Cur. adv. vult.

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The following judgments were delivered:—

GLOVER, J. (after shortly stating the facts), continued.—

Mr. Woodroffe, for the accused Belilios, contends that the Judge's proceedings were irregular, and that he committed various illegalities in the conduct of the trial, which materially prejudiced his client's defence. Mr. Woodroffe also contends that under the provisions of s. 294 of the Code of Criminal Procedure, this Court can go into the whole case and decide whether the judgment of the Court below has been warranted by the evidence.

It will be convenient, I think, to consider the last objection first. By s. 294 we are empowered to consider the legality or propriety of "any sentence or order passed;" by which I understand that an illegal or improper sentence or order may be set right by the High Court, as for instance, where a man is sentenced to seven years' rigorous imprisonment for the offence of hurt, or when a man is called upon to furnish security to keep the peace without any evidence having been taken as to the likelihood of a breach of it: here the sentence and order would have been illegal and improper, and this Court would have applied the remedy under the section. But the section does not say that the High Court may consider the propriety of the judgment passed by the Court below: and that the omission in this case is intentional is, I think, shown by the wording of s. 286, which allows a judgment by a subordinate Court to be set aside by a Sessions Judge or Magistrate to the High Court, which is contrary to law. A great difference is made between "sentences or orders" and "judgments;" the one may be set aside for illegality or impropriety, the other for illegality alone. And were it not so, it would be impossible to understand the meaning of s. 286. The High Court has no power of hearing of appeals; but if the words of s. 294 were taken to empower the Court to take up every case of review, it would be impossible to set aside and decide it on its merits, it would be impossible to set aside the law nowhere contemplates, viz. the power of the High Court from the decision of the Magistrate. This, it seems to me, is an

meaning which the learned Counsel would place on the terms of s. 294. That section is, I consider, limited to "sentences and orders" as distinct from "judgments," and that the latter cannot be interfered with (except in cases where the law gives an appeal on the facts), unless it be shown that the judgment is contrary to law.

But then it is contended that there have been illegalities in the judgment. These are said to be the Deputy Magistrate's, and the Judge's refusals to allow certain witnesses to be cross-examined, and their rulings that certain communications made to some of those witnesses were privileged. The Advocate-General has very fairly admitted that he is not prepared to support the Judge's decision on these points: and there can be no doubt, I think, that the accused ought to have been allowed an opportunity of cross-examining, and that the communications between Sims and his clerk were not privileged. But, after all, what does the objection amount to? The answers which the accused expected or hoped to elicit from these witnesses had reference to the prosecutor's original statement that the money had been lost by gambling, and both and his clerk admitted clearly that Kally Doss had made that statement. The other witnesses could have done no more, and the Judge took the point into careful consideration, and with a full perception of the improbabilities attaching to the prosecution. He weighed the evidence of the Deputy Magistrate, Harendra Krishna, of Mr. Sims, and of his clerk, and Kally Doss' story of the gambling had been told. The whole thought that "he ought not to find (in the Judge's own words) "that there was any error, therefore, that the Judge was wrong in his examinations, and in not insisting on the facts, can it be said that there has been any irregularity in the "proceedings" such as is required

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below such as to allow of our interfering under s. 297 and of annulling the judgment. But I am by no means prepared to go this length. I do not think that I should have convicted the accused Belilios on the evidence to be found on this record. His testimony was entirely uncorroborated, and was moreover inconsistent with his previous acts, besides being highly improbable, still I cannot say that the Court below was undoubtedly wrong in believing Kally Doss' evidence, or in allowing so little weight to that of Mr. Sims and his clerk. The Judge (an officer of unquestioned ability and long experience) had these witnesses before him, and so had advantages in forming an opinion which this Court cannot have, and if he, after a careful and deliberate weighing of that evidence, came to a conclusion unfavorable to the accused, I do not think that this Court would be justified in interfering under s. 297, however much it might hold a contrary opinion as to the value of the evidence.

One portion, however, of the Sessions Judge's decision must be altered. The Advocate-General, on the part of the Crown, has admitted that the order of the Sessions Judge, directing the payment of the Rs. 2,000, previously deposited by Zahoordeen, to Kally Doss, cannot be sustained, and there is certainly nothing on the record whereby the accused can be in any way connected with this money, or to show that the Rs. 2,000 were any part of the sum obtained by the cheating. So much of the Sessions Judge's order must be set aside, and the money will be returned (if it has been paid to the accused) to the party by whom the money was deposited, or to his representatives. With this exception, I hold that the Sessions Judge has been made out for our interference when he refused to interfere, and that on the merits of the case we have no power to interfere at all.

I would therefore reject this application, and direct the petitioner to surrender to his bail and be committed to prison under his sentence.

PONTIFEX, J.—The record in this case is not complete. s. 294, Criminal Procedure Code, requires the petitioner stating that irregularities in the proceedings of the Court are not sufficient to warrant a new trial.

to satisfy itself as to the legality or propriety of the sentence passed by the lower Court.

The irregularities complained of were as follows:—1st.—That the lower Court had directed payment to the prosecutor of a sum of Rs. 2,000 standing in deposit, and over which it had no jurisdiction. 2ndly.—That certain questions proposed to be asked by the defendant's Counsel of some of the prosecutor's witnesses had, on the alleged ground of privilege, been stopped by the Court, and that two witnesses, who had been examined for the complainant in the original investigation before the Magistrate, had not been produced for cross-examination by the prisoner.

With respect to the first irregularity, the Advocate-General has conceded that the lower Court had no jurisdiction to deal with the Rs. 2,000: and the order of the lower Court must be modified so far by directing the refund of the Rs. 2,000 to the person (or his representatives) who, in pursuance of the order of the lower Court, paid that sum, if it has been paid, to the prosecutor.

With respect to the questions proposed by the prisoner's counsel having been stopped on the ground of privilege, the fact is that in the lower Appellate Court, the questions, which originally been stopped, were put and answered; and with respect to the prisoner not having had the opportunity of cross-examining two of the original witnesses for the complainant, it is not to say that the lower Court has not relied on either of those witnesses, and its decision would undoubtedly have been the same if those two witnesses had never been examined. It has been argued on behalf of the prisoner that the questions having on proper and sufficient grounds been examined by this Court, we may now apply the whole evidence in the lower Court, and if we find it improper, we may, under ss. 294 and 297, reverse such judgment, sentence, or order as we

under s. 294 we have no power to reverse such judgment, unless there has been some error of law which renders such conviction illegal and void. It is further of opinion that there has not in

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this case been any such material error in law as would authorize us to interfere with the conviction; and if the conviction stands, I cannot say that the sentence is an improper one for the offence for which the prisoner has been convicted.

Upon first hearing the evidence, I was strongly inclined to think that I should not myself have considered it sufficient for a conviction, and even now, if I were trying the prisoner on the evidence taken in the Courts below, I should myself discharge the prisoner on the ground that the evidence was not sufficient for his conviction. But I am bound to say that, after a careful perusal of all the papers in the case, the judgment of the Court below does not seem to me to rest upon such a weak foundation of evidence as I at first supposed. I think there can be no doubt upon the evidence that the prosecutor did own some share or interest in indigo factories. It is immaterial to the propriety of this conviction whether such indigo factory, or the prosecutor's interest therein, was of the value of Rs. 80,000? The questions are has the prosecutor any interest in any indigo factory, and did he attempt to sell such interest for Rs. 80,000?

There is certainly evidence on both those points, and on the evidence the Court below, which is under the law the proper tribunal to come to a final decision on the facts, has convicted the prisoner. With such conviction, therefore, we cannot interfere: and except with respect to the Rs. 2,000, which was repaid as before mentioned, the sentence of the lower Court will stand.

Sent

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the provisions of Acts XLIII of 1860 and XXIII of 1861, since those Acts are to be read and taken as part of Act VIII of 1859, by s. 387 of which it is provided that in suits pending when the Act came into operation, no right of appeal which would have existed but for the passing of the Act shall be taken away; and although s. 387 is repealed by Act XIV of 1870, s. 1 of the last-mentioned Act provides that it shall not affect any established practice or procedure. He cited *Bholanath Dutt v. Mohadeb Sheet* (1) in support of his contention.

Baboo *Bhowani Churn Dutt*, for the respondent, contended that a special appeal was expressly barred by s. 27 of Act XXIII of 1861, which was a re-enactment of s. 1 of Act XLIII of 1860. He cited the following cases:—*Soorjo Coomar Surma Roy v. Krishto Coomar Chowdhry* (2); see also *Mobarukoonissa Begum v. Ozeer Jemadar* (3), *Anund Chunder Roy v. Sidhy Gopal Misser* (4), and *Ram Jadub Chatterjee v. Rash Monee Dossee* (5).

Baboo *Mohini Mohun Roy* in reply.

The judgment of the Full Bench was delivered by

COUCH, C.J.—We are all of opinion that an appeal does not lie in this case. The appeal will therefore be dismissed with costs.

(1) 3 W. R., Mis., 19.

(2) *Akte*, p. 224.

(3) 8 W. R., 107.

(4) 8 W. R., 112.

(5) *Id.*, 321.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

NOCOORDASS MULLICK AND ANOTHER v. JEWRAJ BABOO.

1873
March 6.*Landlord and Tenant—Holding over after Expiry of Term—Monthly or Yearly Tenancy—Notice to quit.*

A and *B* let a house and premises in Calcutta to *C* under a Bengali lease for a period of three years from 1st Asar 1273 (14th June 1866). Upon expiration of the term, *C* continued in possession of the house, and *A* and *B*, after repeatedly calling upon him to deliver up possession, served on him on 18th March 1873, in a letter written by their attorney, a notice to quit "on or before the 1st day of Jaishita 1280 B.S., corresponding with the 13th day of May next." *Held* that *C* after the end of his lease held merely from month to month, and that the tenancy was terminable by a month's notice. *Held*, further, that the letter of the 18th March 1873 was a sufficient notice.

There is nothing which makes it a necessary inference that a tenancy in Calcutta is a tenancy by the year, in the absence of any special agreement to the contrary. So far as there is any custom in Calcutta, or any inference of fact to be drawn from mere occupation accompanied by payment of a monthly rent, it is that the tenancy is a monthly one.

This was an action of ejectment. The plaintiffs stated in their plaint that they let the house and premises No. 12, 8, Roopchand Roy's Street in Calcutta, to the defendant by a Bengali lease, for a period of three years, from 1st Asar 1273 B.S. (the 14th of June 1866 A.D.) At the end of the said term, they repeatedly called upon the defendant to deliver up possession of the house; and on his failing to do so on the 18th of March 1873, caused the following notice to be served on him, which was signed by D. C. Dutt, Attorney-at-law for Nocoordass Mullick and Bonomally

and under instructions from, my clients,
Nocoordass Mullick and Bonomally Mullick, your landlords,
do hereby give notice and call upon you to quit and
deliver up possession of the house and premises No. 12, formerly

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No. 8, Roopchand Roy's Street, commonly called Punchanuntollah Battee, in the town of Calcutta, in your occupation as their tenant, on or before the 1st day of Jaishtha 1280 B.S., corresponding with the 13th day of May next; and give you notice that, in default thereof, my clients will adopt such legal proceedings against you to eject you therefrom, as they may be advised, without further reference. Dated this 18th of March 1873."

The defendant did not comply with the terms of this letter, and in his written statement he admitted the receipt of the letter, but contended it was not sufficient notice to quit.

Mr. *Branson* and Mr. *Bonnerjee* for the plaintiffs.

Mr. *Wood* and Mr. *Tooze* for the defendant.

Mr. *Branson* submitted that the written statement contained no defence, as the notice to quit was admitted, and he was prepared to prove that the attorney had authority to give such notice.

Mr. *Wood*.—The lease was for a term of years; on expiration of the term the presumption would be that, if the tenant was allowed to continue to hold as tenant, the tenancy would be a yearly one, terminable only by six months' notice, ending at the end of a year's occupation. Moreover, the notice required It requires the tenant to quit on or before the 1st day of the month; if he was in until the 1st, then a new tenancy for a month began, and the notice was therefore bad for want of notice. *Poole v. Warren* (1).

Mr. *Branson* in reply.—The tenant is entitled to remain in possession until the last moment of the last day of the term, and must quit the instant after his term expires. He ought to have notice to go on the anniversary of the expiration of his term. See *Cutting v. Derby* (2), *Kemp v. Derrett* (3), *Thewes v. Thewes* (4); therefore the notice to quit was good.

(1) 8 A. & E., 582.

(2) Wm. Bl., 1075.

authority has been cited to support the contention that a tenant holding over after a term of years becomes a yearly tenant.

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MACPHERSON, J.—I know of no law applicable to this case, by which I am bound to declare that the tenure of the defendant, after the expiry of the term of three years named in his lease, was a holding by the year, any more than that it was a holding for a further term of three years. There is nothing which makes it a necessary inference that a tenancy in Calcutta is a tenancy by the year, in the absence of any special agreement to the contrary. So far as there is any custom in Calcutta, or any inference of fact to be drawn from mere occupation accompanied by payment of a monthly rent, it is that the tenancy is a monthly tenancy only; see *Brojonauth Mullick v. Weskins* (1). Therefore, I hold that the defendant, after the end of his lease, held merely from month to month, and that the tenancy was terminable by a month's notice. As regards the notice itself, I think it was sufficient, because it was substantially a notice to quit at the end of the month, and a notice is good if given on or after the anniversary of the day on which the tenure commenced. There is no doubt of the authority of the attorney to give the notice. There will be judgment for the plaintiffs; with costs on account. No. 2.

Judgment for plaintiffs.

for the plaintiffs: Baboo *D. C. Dutt*.

for the defendant: Mr. *Leslie*.

(1) 2 I. J., N. S., 163.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.

1874 JUGESSUR DEY (DEPENDANT) v. KRITARTHO MOYEE DOSSEE
 Jany. 24. (PLAINTIFF).*

Arbitration, Reference to—Powers of Appellate Court—Act VIII of 1859 ss. 312 & 313—Act XXIII of 1861, s. 37.

An Appellate Court has no power, even by consent of parties, to refer a case to arbitration under the arbitration sections of Act VIII of 1859, which apply only to Courts of original jurisdiction; nor is such power conferred on an Appellate Court by s. 37, Act XXIII of 1861.

THIS suit was brought for the recovery of money on an adjustment of the accounts of a shop, the claim being laid at Rs. 4,500. The Subordinate Judge of East Burdwan made a decree, by which he awarded to the plaintiff a part of his claim and disallowed the remainder. From this decree there was an appeal to the Officiating Judge. The case was, with the consent of the parties, referred by that Court to arbitration. An award was made, in the terms of which the Officiating Judge, after refusing an application to set aside the award, confirmed the decree.

A special appeal was then preferred from that decree on the ground that the reference to arbitration could not be made. The appeal came before Jackson and the Full Bench. The question referred to a Full Bench the question "Whether the Court has power, by consent of the parties, to refer a case to arbitration," with the following remarks:

GLOVER, J. (after stating the question):

* Special Appeal, No. 805 of 1871, from the decision of the Subordinate Judge of East Burdwan, dated the 25th March 1871, and the decision of the Subordinate Judge of that district, dated the 10th April 1871.

In *Rusool Bibee v. Sheikh Jan Ali Chowdhry* (1), where I was one of the Judges, it has been ruled that an Appellate Court

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(1) *Before Mr. Justice Glover and Mr. Justice Mitter.*

The 1st December 1871.

RUSSOOLBIBEE (PLAINTIFF) v. SHEIKH JAN ALI CHOWDHRY (DEFENDANT).*

Arbitration, Reference to—Powers of Appellate Court—Act VIII of 1859, ss. 812 & 818—Act XXIII of 1861, s. 87—Delay in making Award.

Baboo *Debendro Narain Bose* for the appellant.

Mr. *R. E. Twidale* for the respondent.

THE judgment of the Court was delivered by

MITTER, J.—This suit was instituted by the plaintiff, now special appellant before us, for the declaration of his title to a piece of land, setting aside a certain kobala set up by the defendant, the special respondent.

The Munsif, after going into the evidence produced by the parties, gave a decree to the plaintiff, holding that the bill of sale in question was a false and fabricated document. On this decision an appeal was made to the Additional Judge, and was allowed by the defendant; and the case was pending on appeal, when the defendant applied to have the matter referred to arbitration. An arbitrator was accordingly appointed by the consent of both parties, and a decision was made by him in favour of the plaintiff to the same effect as the Munsif had done. The plaintiff then applied for certain

objections to the award. But those objections were overruled by the Additional Judge, Mr. Simson, on the 6th May 1871.

Somehow or other the case was subsequently transferred to the Judge of the district, and that officer being of opinion that an Appellate Court is not competent under the Code of Civil Procedure to refer a case pending in appeal to arbitration, set aside the award, and, after hearing the appeal on the merits, came to the conclusion that the decision arrived at by the Munsif was erroneous.

We are of opinion that the District Judge had no power to set aside the award, and that the reasons assigned by him in support of his opinion that an Appellate Court is not competent to refer cases to arbitration are not sound in law. We see no reason whatever why an Appellate Court should not exercise in this respect the same powers as those possessed by the Court of original jurisdiction. The law, s. 37 of Act XXIII of 1861, distinctly lays down that Appellate Courts are competent to exercise the same powers in cases of appeal as those conferred upon the Courts of original jurisdiction. On the face of such express declaration by the Legislature, we are at a loss to make out how the Judge came to the conclusion that the reference to arbitration made by the Additional Judge was not warranted by law, and that the award was therefore null and void. The argument based upon the use of the word "suit" in s. 312 of the

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has such power, and after full consideration I am still of the same opinion.

I was at first somewhat doubtful as to the enunciation of the principle, chiefly on two grounds: 1st, that where an Appellate Court referred a case to arbitration, it would have first to reverse the decision of the Court below and then make the reference, in which case there would have been a "final judgment" passed in the case, which would, under s. 312 of the Procedure Code, have prevented the reference; and 2ndly, that where the lower Court's order was not formally reversed by the Judge, the result of the arbitration might be to set aside the decision of the Civil Court, a proceeding which seemed to me to be without authority. But these difficulties are, I think, removed by the consent of the parties, and their consent to have a case tried in a particular way takes, I think, the matter out of the purview of the Act so far as procedure is concerned.

The question however is not without difficulty, and I am quite willing to refer it for the authoritative decision of a Full Bench.

Code of Civil Procedure is of no force whatever. An appeal is nothing more than a continuation of the original suit; and even if the word "suit" as used in the section above referred to, be understood in the restricted signification put upon it by the learned Judge, the provisions of s. 37 of Act XXIII of 1861 would be quite sufficient to justify an Appellate Court in referring cases to arbitration; provided, of course, that the parties are willing to adopt that mode of settling their differences.

An objection is raised by the respondent against the validity of the award, upon the ground that it was not completed within the time fixed by the Court. We find, however, that this objection was raised before the Additional Judge, and rejected by that officer. Moreover, the respondent has not made any attempt to show that the delay "arose from corruption or misconduct

on the part of the arbitrator;" or "that the award was made after the issue of an order of Court superseding the arbitration and recalling the suit." The provision contained in the last part of s. 318 of the Civil Procedure Code is quite conclusive on this point, and in the absence of evidence of the facts above referred to, we do not see how the respondent can sustain this objection.

For the above reasons we reverse the decision of the Court below, and order the case to be referred to the arbitrator. We have to remind the parties that the award is to be made within the time fixed by the Court, and proper steps are to be taken to prevent any delay.

We think the costs should be paid by the respondent.

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JACKSON, J.—I think the matter should be referred for the decision of a Full Bench, as it seems very doubtful whether the framers of the Code contemplated a reference to arbitration of the decree in the Court of first instance.

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Baboo *Rash Behari Ghose* for the appellant.—The position of s. 312 and the following sections in the Code of Procedure shows that the exceptional procedure by arbitration was intended only to apply to a Court of original jurisdiction and at a stage of the suit before any decree had been made. Chapter iii is headed "Of a suit till final decree," which means the decree of the first Court. The provisions in that chapter as to the taking of evidence and other similar matters could not apply after there had been a final judgment, and in this case there was a final judgment before the reference to arbitration. The Appellate Court has no power to authorize the arbitrators to take evidence.

The power of referring cases to arbitration is not one that is inherent in the Court, but is a special power conferred on the Court by law. By s. 37 of Act XXIII of 1861, the Appellate Court has the same powers as the first Court where there is nothing in the other sections of that Act to contradict it: a reference to arbitration is not only a power conferred on the Courts, but it is a duty imposed upon them. They are to make the reference, when an application is made by the parties to a case for that purpose. It cannot be said by s. 37 it was intended that the Appellate Court should have all the powers of the first Court, but should be imposed upon it all the duties and obligations provided by the Code. In *Juggessur Mookerjee v. Gopee* it was held that the Appellate Court cannot call for evidence from the parties. In *Kalikrishna Chandra Dutty* (2), Phear, J., expresses an opinion that the powers in Courts of original jurisdiction spoken of in the Code are vested otherwise than by the words of

(2) 1 B. L. R., A. C., 155, at p. 161.

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Baboo *Bama Churn Banerjee* for the respondent.—It was correctly held in *Russool Bibee v. Sheikh Jan Ali Chowdhry* (1) that the Appellate Court has, under s. 37 of Act XXIII of 1861, the power to refer cases to arbitration. Under this section the Appeal Court has all the powers of the Courts subordinate to it. It would be strange if it were not so. And if the Court of Appeal could refer a case, it could also authorize the arbitrators to receive fresh evidence in cases where fresh evidence could be receivable in appeal. If fresh evidence was not under the circumstances of the case receivable, the arbitrators would have to decide the case upon the evidence already recorded. If it be true that by s. 37 it was intended merely to extend to the Appellate Court the powers conferred, and not the duties and obligations that are imposed, upon the Courts of original jurisdiction, still the Appellate Court would have the power, though it would not be bound, to refer a case at the request of the parties. The ruling in *Juggessur Mookerjee v. Gopee Kishen Sein* (2) has no application to this case.

After a case has been heard and a final judgment has been given, it is too late to call for a written statement, &c. while a case is being heard on appeal. In like manner Appellate Court cannot receive fresh evidence, unless there is some good reason for it, which the Court is bound to receive. But there is nothing in the Code to show that, if a case is referred for decision to arbitrators by the Appellate Court, the provisions of Chapter iii will be called into requisition, so that it would be necessary to do, would be to let the arbitrators decide the matters in dispute between the parties upon the evidence which had been already recorded, and if there is some good and sufficient reason for receiving fresh evidence, the Court may direct the arbitrators to receive it, recording the reasons for allowing it to be done. In the case of *Ramesh Chandra Bhurosa Koonwar* (3), it was held that under s. 37 of Act XXIII of 1861 the Appellate Court has all the powers of the Courts of original jurisdiction, and the Appellate Court could permit an appeal to be referred to arbitrators.

(1) *Ante*, p. 267.

(3) 9 W. R., 328.

The question therefore being whether the Appellate Court has the power to refer a case to arbitration must be answered in the affirmative. The question whether the Appellate Court would be bound to refer does not arise upon this reference.

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Baboo Rash Behari Ghose was not called upon to reply.

The following judgments were delivered by the Full Bench.

COUCH, C.J. (JACKSON and PONTIFEX, JJ., concurring), (after shortly stating the facts of the case, continued)—The power to refer suits to arbitration is contained in s. 312 of Act VIII of 1859, and the subsequent sections. It is under these sections that the lower Appellate Court has acted, having made a decree in the terms of the award as directed by s. 325.

S. 312 says:—"If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court, at any time before final judgment, for an order of reference."

This section is in the part of the Act which relates to the proceedings of the original or primary Court; and the words "final judgment" here appear to me undoubtedly to mean the final judgment of that Court, the word "final" being used to distinguish the judgment from a preliminary or interlocutory judgment. "Final" here does not mean the final judgment in the suit in which there can be no appeal, but the final judgment in the suit in which the suit is brought. And this section will apply to a Court of Appeal. We shall see that there is nothing in the Act, or in any subsequent Act, which prevents it applying; but looking at the section alone, it seems to me to do so.

It is that "the Court shall, by an order under its authority, refer to one or more arbitrator or arbitrators the matters in difference between them or they may be required to determine." It appears to me to be imperative upon the parties to agree to refer, and properly nominate arbitrators, and no discretion in the matter. It is not

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a power which the Court may or may not exercise as it thinks fit, but the Act confers upon the parties agreeing to arbitration the right to have the reference.

S. 317 says that when the reference is made to arbitration by an order of the Court, "the Court shall issue the same processes to the parties and witnesses whom the arbitrator or arbitrators may desire to have examined," &c. That again appears to me to be imperative upon the Court, and not a mere discretionary power which it may or may not exercise. In s. 325 provision has been made for remitting the award to the arbitrators for reconsideration, and it is provided that "if no application is made to set aside the award, or if the Court shall have refused such application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case, if the award shall have been submitted to it in the form of a special case." That appears to me to give to the parties who have referred a suit to arbitration, when an award has been made, a right to have a judgment passed by the Court according to the award. All these sections show that it is something more than a mere power in the Court to refer. It is a right which the parties have, if they think fit to exercise it.

I have said already that these sections apply to the Court in which the suit is brought—the primary or original Court. They can only be made applicable to a Court of Appeal by s. 326 of the Act XXIII of 1861, and I think that section does not make them applicable to it. It provides that "unless when provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits."

This does not appear to me to be a power within the meaning of that section. It is an enabling clause giving the Appellate Court various powers which may be exercised in cases of original jurisdiction; but for the reasons I have given I think referring to arbitration does not come within the meaning of the word "power." If it were intended that the Court should be bound to refer a case which was referred to arbitration, when the parties agreed to arbitration, the Legislature would have been more explicit.

And if there were any ambiguity in the meaning of the word "power," and it were doubtful whether it might not be construed to include reference to arbitration, I think we should consider that neither reason nor convenience requires that the Appellate Court should refer a suit to arbitration in that way. It would enable the parties to it, by agreement between themselves, to refer to the decision of arbitrators chosen by themselves the propriety (it might be on a question of law) of a decision of one of the Courts—perhaps not the High Court, as the Act does not now apply to the High Court so as to be imperative,—it would enable the parties to agree to substitute, as a decree in an appeal from the decision of a District Judge or a Subordinate Judge, the opinion of arbitrators appointed by themselves. I think this would not be either reasonable or convenient; and if there were a doubt as to the meaning of the word "power" in s. 37, I should hold that there was a good ground for not giving to it a construction which would impose upon the Court of Appeal the obligation to refer a suit to arbitration.

The decision of the District Judge having proceeded entirely upon the ground that these sections in Act VIII of 1859 applied to the Appellate Court, and he having passed a decree under the authority given by them, I think the decree must be set aside, and the suit must be remanded for rehearing. The costs will be the result.

Mr. Justice, J., who is not present, concurs generally in this

After hearing the judgment, which has just been delivered by the learned Chief Justice, any doubts I may have as to the propriety of the decision are entirely removed. The people of this country are encouraged as much as possible to refer their disputes to arbitration. That is a method of deciding disputes which is frequently resorted to in this country, and is very popular to the people of the country, and is in accordance with the customs and habits, and I think it is very proper that as far as possible should be placed

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upon references to arbitration; but, as pointed out by the Chief Justice, if parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of Justice, such a proceeding might tend to bring the lower Courts into contempt.

On the whole, therefore, I concur in the judgment delivered by the Chief Justice.

GLOVER, J.—I also concur. When this reference was made I was inclined to think that the consent of the parties got rid of the difficulty, and that reference could be had to arbitration notwithstanding that the case had got to the appellate stage; but, after further consideration, and I may add, after hearing a fuller argument, I am doubtful as to the correctness of my first impression; at all events I am not prepared to dissent from the judgment which has just been delivered by the Chief Justice.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.

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DINOMONEY DABEA AND OTHERS (DEFENDANTS) v. DOORGAPERS MOZOOMDAR AND OTHERS (PLAINTIFFS).*

Limitation—Landlord and Tenant—Trespasser—Adverse Possession

The plea of limitation can be raised and determined in a suit brought by a landlord against a person who is really a trespasser, but who has set up a case of tenancy.

THIS was a suit for possession of certain lands. The plaintiffs alleged they had been dispossessed by the defendants in the year 1269 B.S. (1862). The defendants submitted a written statement that the suit was barred by the Limitations, and that they were entitled to the land in dispute under a *maurasi* lease granted to them by the predecessor of the plaintiffs.

* Special Appeal, No. 1161 of 1870, from a decision of the District Court of Backergunge, dated the 23rd March 1870, affirmed by the Court of Madarigunge, dated the 30th June 1869.

The Court of first instance tried the issue of limitation with the merits of the case, and dismissed the suit.

On appeal, the Judge held that the question of limitation could not arise, inasmuch as the defendants had admitted that they were the tenants of the plaintiffs. The case was accordingly sent back to the Court of first instance for further investigation. That Court eventually gave a decree for the plaintiffs. On appeal the facts found by the lower Appellate Court were, 1st, that the plaintiffs had failed "to prove their alleged dispossession and previous khas possession;" and 2ndly, that the defendants were mere "trespassers," no relation of landlord and tenant having ever existed between them and the plaintiffs. The appeal was consequently dismissed.

A special appeal was preferred to the High Court, which was heard before Jackson and Mitter, JJ., and the questions raised were, 1st, whether the lower Appellate Court was right in overruling the plea of limitation upon the ground set forth in its judgment; and, 2ndly, whether the finding of that Court on the question of possession was sufficient as it stood to meet the requirements of that plea.

The learned Judges were of opinion that the Judge was wrong in overruling the plea of limitation, and that the allegation by the defendant that the relation of landlord and tenant existed between the plaintiff and himself did not preclude him from raising that plea. As, however, another Division Bench had decided differently in the case of *Watson v. Ranee Shurut Debia* (1), they referred the following question for the consideration of a Full Bench:—

Is a person who brings a suit for possession of land brought against a trespasser, but who has set up a false plea of limitation, entitled to have the issue of limitation can be raised and determined?

The Full Bench referred with the following remarks:—

In reference to the first question I am of opinion that the proposition of the special appellants is sound. It is a correct proposition of law that a tenant is

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not entitled to plead limitation against his landlord. But this proposition, I apprehend, is applicable to those cases only in which the parties are really related to each other as landlord and tenant. In the present case, the Judge has found, as a fact, that there was no such relation between the parties; and it follows, therefore, that he has applied the law of landlord and tenant to a case which, according to his own finding, is not a case of landlord and tenant at all.

It has been argued that the defendants have deliberately placed themselves in the position of tenants; and as a tenant is not entitled to plead limitation against his landlord, the Court cannot allow the defendants to take up a plea which is inconsistent with the position they have voluntarily assumed. I am of opinion that this argument is not sound.

In the first place it is not very clear whether the doctrine of estoppel by pleading is applicable to cases in this country. But without entering into this question, I think I may safely affirm that we have got no such things as pleadings technically so called. The written statements filed in our Courts are not pleadings in the strict sense of the term. S. 123 of the Code of Civil Procedure lays down what a written statement should contain, and it says in so many words that "written statements shall not be by way of answer the one to the other." Then again s. 139 enacts that it is for the Court to lay down all the issues of law and fact upon which the right decision of the case may depend; and it further says that "the Court may draw inferences from the allegations of fact which it collects from the examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact and the facts of fact contained in the written statements, if and as far as the parties or their pleaders." These provisions show that pleadings strictly so called are unknown in this country, but also and specially that an allegation in a written statement is not by itself absolute evidence against the maker.

But if the doctrine of estoppel by pleading is applicable to this case, there seems to be no other law upon which the plaintiffs can take

sion deliberately made by a party is certainly admissible as evidence against himself. But if we once treat the admission of the defendants in this case as a mere matter of evidence, the argument of the plaintiffs must fall to the ground. An allegation of fact which is found to be untrue must be treated as such for all the purposes of the suit; inasmuch as it would be obviously illogical and unsound to make one and the same decision depend upon two states of facts diametrically opposite to each other. If we decide, as a matter of fact, that the defendants were trespassers, we cannot in the same case overrule the plea of limitation upon the assumption of a quite different state of facts, namely, that the defendants were the tenants of the plaintiffs. If the plaintiffs can say to the defendants that they, the defendants, cannot be permitted to blow hot and cold by taking up a plea which is inconsistent with the case relied upon by them, the defendants also can say to the plaintiffs with equal reason that they, the plaintiffs, should not be permitted to blow hot and cold by getting rid of the plea of limitation upon the ground of a supposed tenancy which has never existed in fact, and which they themselves have been repudiating throughout, inasmuch as their case was that the defendants have been holding possession as trespassers. Neither of the parties can complain that their status has been altered or affected in any manner by the false allegations of fact put forward by their adversaries, and I do not therefore find any reason why any of those allegations should be used as an estoppel against either of them in any sense of the term.

It has been said that the question of limitation cannot possibly be decided in a case like the present, until it is determined that there is no relation of landlord and tenant between the parties, and as this question must be laid down before the case is heard on the merits, the plea of limitation could be laid down by anticipation. This argument is not, in my opinion, entitled to any weight. It is the duty of the Court to lay down all the issues in dispute, in which the right determination of the case depends, or such of them as would be sufficient to dispose of the case, must be determined in the most rational manner, and the circumstances of the case will permit. There

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is no law that I am aware of which says that the issue of limitation must, in every case, be invariably tried at a particular stage of the trial, or that no such issue ought to be laid down, if it is found that its determination would depend upon the previous determination of the other issues involved in the case, or of any particular class of them. Suppose, for instance, that a suit is brought to recover property from the hands of an alleged trustee. The defendant denies the trust, but at the same time relies upon the ordinary rule of limitation in his defence. Can it be said that the issue as to whether the suit is barred by the ordinary rule of limitation or not, ought not to be laid down in such a case, because the occasion for determining that issue would not arise until it is determined that the case is not a case of trust at all?

It may be said that in the case supposed there is no inconsistency between the issue of limitation and the case set up by the defendant upon the merits; but I have already disposed of this last mentioned objection, and I have referred to the above illustration simply for the purpose of showing that the argument based upon the supposed difficulty of laying down the issue of limitation in a case like the present, is not, by itself, of any weight whatever.

It may be urged that the defendants ought not to be permitted to fall back upon the Statute of Limitations after they have failed to substantiate the false defence which they have been allowed enough to set up. But the Court has no power to inflict a penalty of this kind, unless it is authorized to do so by an express legislative enactment. This point has, I believe, been finally set at rest by the decision of the Privy Council in the case of *Ranee Surnomoyee v. Maharaja Suteeschun*. I have simply to add that if the defendants were liable to such a penalty, there seems to be no reason why a penalty should not be inflicted upon the plaintiffs for falsely alleging in their plaint that they had brought the case against the defendants in the year 1269 B.S.

Let us suppose for one moment, that the case was brought forward with an allegation in their plaint

dispossessed by the defendants (a party of trespassers) on a date more than twelve years previous to the institution of this suit. Such a claim would be barred by limitation on the very face of it, and the Court would be bound, under the provisions of the 32nd section of the Code of Civil Procedure, to reject it upon that ground without even summoning the defendants. But if the subsequent appearance of the defendants with a false allegation of tenancy could save the plaintiffs from the consequences of their own laches, such rejection of their claim would be not only premature but unjust; and hence it follows that in the case supposed, the fate of the plaintiffs' claim would be precisely the same whether its liability to be dismissed on the ground of limitation is discovered before or after the appearance of the defendants. How then can it be said that the law of limitation would not apply to this case, if the defendants have been *de facto* in possession for a period of more than twelve years prior to the date of suit not as tenants, but, as the Judge himself has found, as "trespassers?" The defendants have not been allowed to derive any benefit whatever from their allegation of tenancy, and if the cause of action of the plaintiffs had really accrued more than twelve years prior to the date of this suit, it would be manifestly unfair to allow them to derive any benefit either from the false allegation of tenancy set up by the defendants, or from the wholly false allegation which they themselves have put forward in their plaint, with reference to the date of their dispossession; particularly when it is borne in mind that if they had candidly stated in that document that they had been dispossessed more than twelve years prior to its presentation, the Court would have been bound to dismiss their claim on the ground of limitation, without waiting for the defendants. So far as falsehood goes, both the parties are equally guilty, if the Judge's finding is correct: and as the Court is bound to base all its decisions upon a true and not upon a false state of facts, there is no reason why the statutory bar should not be equally applicable to the actual facts of the case. It is brought upon a certain cause of action, and it is not shown that the cause of action is not barred by limitation. It does not mean for one moment to say that a

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plaintiff is bound to prove the precise date of his cause of action, as alleged in the plaint, but he is, in my opinion, clearly bound to show, when required, that the cause of action has not been extinguished by operation of time. The only case in which the view taken by me might appear to be hard, is that in which there is not only an admission in the written statement of the defendant that he was the tenant of the plaintiff, but in which it is also found that the defendant has been avowedly claiming to hold as a tenant throughout the entire period of his possession. But the present case stands upon a quite different footing. The plaintiffs have neither alleged nor proved that this was the real state of things, and as for the defendants, their allegations have been found by the Judge to be untrue. But be this as it may, there seems to be no reason why the law of limitation should not apply even to a case like the above. Whether the defendant did, at any time during the period of his possession, acknowledge that possession to be the possession of a tenant or not, it seems to be pretty clear that no such acknowledgment can stop the operation of the law of limitation. The plaintiffs' cause of action remains the same. That cause of action originated in a wrongful act of dispossession by the defendants, and no pretended title of tenancy set up by the latter can alter either the nature or the date of that dispossession, or convert the case into one of landlord and tenant, when in point of fact there was no such relation between the parties. The plaintiffs might have, and ought to have, brought upon their cause of action within the period prescribed by the Statute, or they might have put an end to the dispute by accepting the defendants as their tenants. But in the absence of such acceptance, the case must be dealt with throughout as one against a trespasser, and not as a case between landlord and tenant.

Much stress has been laid by the respondent on the decision passed by a Division Bench of this Court in the case of *Ranee Shurut Soonduree Debia* (1). But for the reasons stated, I am unable to concur with the learned Judge in that decision was passed; and I would therefore refer the matter to a Full Bench for an authoritative decision.

With reference to the second question raised in this special appeal, I am of opinion that the Judge's finding on the point of possession is not sufficient to meet the requirements of the issue of limitation. The plaintiffs might have failed to prove the precise date of dispossession alleged in their plaint, and they might have also failed to prove their khas possession immediately previous to that date. But it still remains to be seen whether the plaintiffs were in possession, either actual or constructive, at any time within twelve years prior to the institution of this suit. I would therefore remand this case to the lower Appellate Court for a fresh trial of the issue of limitation, subject to the opinion of the Full Bench.

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JACKSON, J.—I concur in the order of reference to the Full Bench. The effect of the decision appealed against as it stands is, that the defendants are found as a fact to have held the land in dispute as trespassers, that is, adversely to the plaintiffs; but because they have alleged themselves to have been tenants of the plaintiffs, they are debarred from setting up the plea of limitation. This view is supported by the case of *Watson v. Ranee Shurut Soonduree Debia* (1), which has been referred to by Mitter, J. In that case the learned Judges observe that, by admitting the right of the plaintiff as the owner of the land in dispute, and acknowledging himself to be the plaintiff's tenant, the defendant precludes himself from setting up adverse possession or limitation. It seems to me that this is the meaning of those words; because the question is not so much whether the defendant is to be permitted to set up a plea of limitation, as whether the Court is to apply the facts which may be found. It seems necessary that this point should be authoritatively settled.

Madhub Ghose for the Appellant.—The arguments of the learned Judges who referred the case to the Full Bench are very reasonable. Where limitation is pleaded, the Court should not take this case out of the operation of the Statute.

(1) 7 W. R., 395.

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Watson v. Ranees Shurut Soondures Debia (1) was wrongly decided.
In *Tekaetni Gowra Kumari v. The Bengal Coal Company* (2),

(1) 7 W. R., 395.

(2) *Before Mr. Justice Kemp and
Mr. Justice E. Jackson.*

The 4th February 1870.

TEKAETNI GOWRA KUMARI (PLAINT-
IFF) v. THE BENGAL COAL COMPANY
AND OTHERS (DEFENDANTS).*

*Limitation.—Landlord and Tenant—
Adverse Possession.*

THE plaintiff in this case sued to recover certain property, called Mauza Kooldeah. He stated that the defendants other than the Coal Company were in possession thereof under temporary leases, which had determined; that, in a former rent-suit, the said defendants had set up a false *mokurrari* tenure of the estate; and that, under color of this false *mokurrari*, they had granted a sub-lease to the Coal Company. The defendants in the present suit relied on the *mokurrari* right; they stated that it had been asserted more than twelve years before this suit; and that they had throughout that period held possession under it; and they contended that the decision in the rent-suit having been in favor of the genuineness of the *mokurrari* tenure, the plaintiff was precluded from re-opening the matter.

The Deputy Commissioner held that neither the temporary leases set up by the plaintiff, nor the *mokurrari* potta set up by the defendants, were genuine; but he considered that the defendants had proved that they held the estate at a fixed rent for more than twelve years anterior to the suit, and that such holding was adverse to the plaintiff,

and therefore that the suit was barred by the law of limitation.

The plaintiff appealed to the High Court.

The Advocate-General (Mr. Allan and Baboos Unnoda Persad Banerjee, Mohesh Chunder Chowdhry, Boodh Sen Singh, and Gopal Chunder Chowdhry with him) for the appellant.

Mr. Paul (Baboo Sreenath Doss and Moonshee Mahomed Yusuf with him) for the respondents.

The judgments of the learned Judge of the High Court, so far as they related to the question of limitation, were as follow (a):—

E. JACKSON, J. — In the appeal before this Court, the Advocate-General appeared for the plaintiff, appellant, and Mr. Paul and Baboo Sreenath Doss for the defendants respondents. *

The learned Advocate-General contended that, on the finding of the learned Judge, that the leases put in by the plaintiff and the defendants arrived at by the Deputy Commissioner, the plaintiff was not barred from a hearing of the merits by the law of limitation.

He relied more especially on the ruling of Her Majesty's Bench in *Raja Sahib Prasad Bahadur Sing* (b) and on the other hand, contended that

(a) The portion of the judgment treated of the present rent-suit as a *mokurrari* potta, see 5 B. L. R. 100.
(b) 2 B. L. R. 100.

* Regular Appeal, No. 168 of 1869, from a decision of the Deputy Commissioner, Hazaribagh, dated the 21st June 1869.

a *mokurraridar* was allowed to plead limitation. The same view was taken in *Ruttonmonnee Dabee v. Komolakanth Mookerjee* (1) and in *Raja Sahib Prahlaḍ Sen v. Maharaja*

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contained circumstances of a special character and was not analogous to the present suit; and that if the plaintiff had been unable to prove the leases which he set up, and which constituted his cause of action, and the defendants' adverse holding for more than twelve years at a fixed rent had been established, the suit was properly held to be barred. * * * * *

It seems to me that if the defendants' case prove that they have held Mauza Kooldeah for more than twelve years previous to the institution of this suit under a *mokurrari* tenure to the knowledge of the plaintiff, the suit will be barred by limitation. They do not, however, allege that at any time beyond such twelve years they have obtained from the plaintiff any such acknowledgment of the *mokurrari*, except by the potta of the year 1201 (1794), and the receipts of the years 1205 (1798), 1206 (1799), 1234 (1827), and 1235 (1828). The genuineness of these papers is denied, and if they are established, they prove the *mokurrari*; and in such case it would be necessary to decide on the question of limitation. The defendants say that they put forward their rights in the year 1854, such as in that year they were to the Bengal Coal Company, which their *mokurrari* was not; but there is no notice of this being given to their representatives. It is also evidence that the defendants

were then setting up a *mokurrari* title, the defendants cannot be said to have held adversely to the plaintiff's present claim. It is proved that in the year 1859 (1266), the plaintiff was informed of the title set up by the defendants; but this suit having been brought within twelve years from that date, the law of limitation will not apply.

KEMP, J.—I concur in this judgment. The relationship of landlord and tenant is admitted as existing between the plaintiff and the defendants. The former alleging that the defendants hold on a terminable lease, the latter that they hold as *mokurraridars*, paying a quit-rent of Rs. 13 per annum. The possession of the defendants is not adverse. There is nothing on the record to show that the plaintiffs were aware of the *mokurrari* title set up by the defendants at any time more than twelve years prior to suit. Their knowledge of the title set up by the defendants appears to have originated with the rent-suit which was brought about nine years before the present suit was instituted.

(1) *Before Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart.*

The 28th August 1869.

RUTTONMONNEE DABEE (PLAINTIFF)
v. KOMOLAKANTH MOOKERJEE
AND OTHERS (DEFENDANTS).*

Limitation—Landlord and Tenant—Adverse Possession.

Baboo Bama Churn Banerjee for the appellant.

of 1869, from the decree of the Additional Subordinate Judge of the 18th April 1869, reversing a decree of the Munsif of 1868.

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Rajendra Kishor Sing (1). Apart from the right of the defendant to plead limitation, the Court should of itself raise the issue where the hearing of a case is barred by lapse of time.

Baboo *Kally Mohun Doss* for the respondent.—A defendant, by admitting himself to be the tenant of the plaintiff, precludes himself from taking advantage of the Statute of Limitation—*Watson v. Rance Shurut Soonduree Debia* (2). The law there laid down ought not to be disturbed. The zemindar has a right to the gross collection of rent upon all his lands—*Raja Sahib Prahlad Sen v. Maharaja Rajendra Kishor Sing* (1).

Baboo *Kally Kant Sen* for the respondents.

THE judgment of the Court was delivered by

HOBHOUSE, J. — IN this case the plaintiff sued for khas possession of land. The defendants objected to such khas possession on the ground that they had held possession as *bye-how-ladars* for a period of more than twelve years.

The lower Appellate Court has found as a fact that the defendants have so held, and has dismissed the plaintiff's suit for khas possession.

In special appeal it is urged, firstly, that there is no legal evidence of the possession found; and secondly, that limitation can never apply to such a suit as this, the plaintiff being admittedly the landlord and the defendants his tenants.

We have had the record read to us, and on the first point we find that there is evidence of the possession, on which the defendants relied—evidence on which the lower Appellate Court might legally come to the conclusion to which it has come.

On the second point we are of opinion that limitation does apply upon

the finding of the lower Appellate Court to such a case as this. We think that when a landlord seeks to obtain khas possession of any land, and when, on the other hand, it is alleged by the tenant that such khas possession cannot be given, because he, the defendant, has been in occupation under a title like that of a *dur-how-ladar* for a period of more than twelve years, limitation might apply in case of khas possession. The question that would have to be determined in such a suit would be whether the landlord had been in possession of the land at any time within twelve years. If he had not, and if, on the other hand, the tenant had been for more than that period in possession upon a title such as that of the *bye-how-ladar*, before us, which the landlord seeks to disturb, clearly, whatever right the landlord might have to his twelve years' right of possession would prevent him, the landlord, from obtaining khas possession of the land, is, from ejecting the tenant.

The special costs.

(1) 2 B. L. R. 100.
Moore's L. R. 100.

(2) 7 W. R. 100.

[COUCH, C.J.—That case does not decide the question whether the tenant can plead limitation.]

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The following judgments were delivered by the Full Bench:—

COUCH, C.J. (JACKSON, GLOVER, and PONTIFEX, JJ., concurring).—The question which is referred to the Full Bench is, whether, in a suit for possession of land brought against a tenant who is really a trespasser, the defendant setting up a false case of tenancy, the issue of limitation can be raised and determined, and the terms in which the question for the Court has been framed is illustrated by the facts as stated in the judgment of Mitter, J.

The defendants in their written statement alleged that the suit was barred by the law of limitation. They also alleged that they were entitled to hold the lands in dispute under a *maurasi* lease granted to them by the predecessor of the plaintiffs. They may have honestly believed that this was the fact, and that such a lease had been granted. They may have failed to prove it, and in fact, according to the finding of the lower Courts, they did fail. I think a written statement putting forward a defence in this manner ought not to be treated as a conclusive admission by the defendants that the facts are as they allege, if the plaintiff denies the truth of the written statement, and has an issue raised upon the allegation. If he had accepted the written statement, and the case had been tried upon the issue so made, it would have been proper for the Courts to find, as the true state of things, that there was a tenancy between the parties. Of course, if there was a tenancy the law of limitation would not apply.

But the plaintiffs did not accept the statement of the defendants as to the tenancy. They denied it, and they succeeded in proving it. And although the plaintiffs have done this and although it is not the true state of things, the Courts are bound to act to the admission as if it were true, and have to say that the law of limitation shall not apply to the case. The fact that the admission is not to be taken to be the true state of things as it is not contradicted by the other party, does not make the limitation will not apply. If this was

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intended to be decided in the cases referred to, I concur in those decisions. But here the question really is this :—Is a defendant to be prevented from setting up the defence that there is a tenancy and at the same time relying upon the law of limitation, if the facts should prove to be such as will support that defence? I think that in many cases it would be productive of the greatest hardship if the defendant was obliged to relinquish the defence of the law of limitation, where he might really have it, in order to be able to say, I believe that I can prove a tenancy between the plaintiff and myself, and I desire to rely upon that. I think we ought to hold that merely by alleging the tenancy in his written statement he does not preclude himself from setting up the defence of the law of limitation. Whether there is that defence to the suit, ought to be determined upon what the facts are proved to be, if the plaintiff resolves to have them inquired into, as was the case here.

KEMP, J.—I concur. I wish only to add that the defendants in their written statement, which I have referred to in the original, set up a *maurasi* holding with reference to some of the plots of the land for which the suit was brought, and with reference to other plots they set up an independent title claiming them as belonging to another talook than that of the plaintiff.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

NILKOMUL SHAW (PLAINTIFF) v. REED (DEPENDANT).*

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April 12.

Indian Succession Act (X of 1865), s. 282—Priority—Act VIII of 1859, s. 203—Decree, Satisfaction of—Executor—Administrator.

Where a person obtains a decree against an executor or administrator, he is entitled to have his decree satisfied out of the assets of the deceased, and s. 282 of the Indian Succession Act does not interfere with that right.

THIS was a suit brought against Mrs. Reed, as the representative of her deceased husband, for goods supplied to him. The claim was decreed against her in her representative capacity, and the amount was directed to be realized out of the estate of the deceased. Mrs. Reed had previously obtained from the Administrator-General a certificate under s. 34, Act XXIV of 1867, entitling her to receive the assets of the deceased, valued at Rs. 479, a part of which consisted of salary due to the deceased in the hands of the Agent of the East Indian Railway Co., which had been attached by this Court before execution of the decree. Mrs. Reed having objected to the whole of the plaintiff's claim being satisfied out of the sum attached, evidence was given on both sides, and the Judge, having ascertained the amount of assets left by the deceased, held that the plaintiff was entitled to what remained after deducting the amount chargeable under ss. 279—281 of the Succession Act. An order was accordingly passed to the effect that the plaintiff was entitled to have Rs. 97-12-6 out of the money attached to her for him.

The defendant applied for a review of this order on two grounds, of which only one is material to this report, *viz.*, that the Judge was wrong in declaring the plaintiff entitled to have his decree satisfied out of the assets of the deceased, to the exclusion of other parties who had claims on the estate, admitted to be correct, but who were not to be satisfied out of the assets of the deceased.

The order was made on the 5th January 1872, by the Officiating Judge of the District Court, Calcutta, including Howrah.

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had not obtained decrees of Court. In support of this contention the defendant relied on s. 282, it being argued that the words "on any other account" in that section included a decree of Court.

The Judge of the Small Cause Court, being of opinion that those words were not meant to cover a decree of Court, and that the construction contended for could not be reconciled with the provisions of ss. 203 and 211 of the Civil Procedure Code, referred for the opinion of the High Court the question whether the plaintiff, under the circumstances stated above, was entitled to satisfaction of his decree to the exclusion of the other creditors, or should it have been left to the discretion of the defendant to satisfy the decree *pari passu* with the other proved claims (not being of the nature specified in ss. 279—281 of Act X of 1865)?

The opinion of the High Court was delivered by

COUCH, C.J.—We think the plaintiff is entitled, as the Judge of the Small Cause Court is of opinion, to have the Rs. 97-12-6, the balance of the assets, after making the necessary deduction for expenses, paid to him towards satisfaction of the decree which he had obtained.

The provision in s. 203, Act VIII of 1859, entitles the decree-holder to have his decree satisfied out of the property of the deceased, or out of the property of the defendant, the executor or administrator, if it should appear that he has not duly applied the property of the deceased; and s. 282 of the Indian Succession Act does not interfere with that right. All that it does is to point out the mode in which the executor or administrator is to administer the assets of the deceased, but it does not enable the executor or administrator, where a decree has been obtained against the deceased, to say that no portion of the assets of the deceased is to be paid in satisfaction of that decree, but he is to satisfy it just as if no decree had been passed, which is the objection raised in this case.

We think that the conclusion which the Judge of the Small Cause Court came to is a right one.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.

DOORGA CHURN SURMA (ONE OF THE DEFENDANTS) v. JAMPA DASSEE
(PLAINTIFF).*

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Dec. 10.

Co-sharers—Suit by one, for separate share of Rent—Parties—Landlord and Tenant—Objection taken for first time on Special Appeal.

One of three co-sharers of certain property, the rent of which was paid by the tenant to a person acting as agent of the co-sharers, from whom they received it in proportion to their respective shares, brought a suit against the tenant for her share of the rent of which she alleged her co-sharers were colluding with the tenant to deprive her. To this suit she made her co-sharers defendants. The defendants alleged that she had not received, and was not entitled to receive, the rent from the tenant, but the lower Courts found these facts in her favor, and gave her a decree. It was objected on special appeal that the suit would not lie, inasmuch as the plaintiff being one of several co-sharers was not competent to sue alone for her share of the rent. *Held*, that, under the circumstances, and the co-sharers having been made defendants, the suit was maintainable.

THE plaintiff in this suit was one of three co-sharers in certain property, for her share of the rent of which she brought a suit making the ryot and her two co-sharers defendants. The lower Courts found in favor of the plaintiff, and gave her a decree for the amount claimed.

The decree was not appealed specially to the High Court on the ground, however, that the plaintiff was not competent to sue alone for her share of the rent, and that, therefore, the suit was not maintainable.

The appeal came before Couch, C.J., and Birch, J., who were of opinion that the suit was maintainable, but finding conflicting decisions on the point, they referred the matter to the Full Bench.

The Full Bench, consisting of the Chief Justice and the other four Justices, on the 9th September 1872, affirmed a decree of the Subordinate Judge, dated the 28th June 1872.

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the question, whether the suit could be maintained, for the opinion of a Full Bench as follows:—

COUCH, C.J.—The plaintiff in this suit is one of three co-sharers in an 8-anna share of rent payable by a ryot Doorga Churn Surma, and she brought the suit against him and the other co-sharers for her share of the rent, alleging that they were colluding with him. Doorga Churn Surma's defence was that he never paid any rent to the plaintiff, and he had been paying rents to the agents of Gour Chand and Lall Chand, the other defendants. Gour Chand contended that the plaintiff did not live with him in commensality, and she did not receive any rent from the ryot. The Munsif decreed that the defendant Doorga Churn should pay to the plaintiff the rents claimed by her with costs.

This was confirmed by the Subordinate Judge on an appeal by Doorga Churn Surma, who has brought this special appeal. It was objected for the appellant that the suit could not be maintained; and the following cases were cited:—*Bhyrub Mundul v. Gungaram Bonnerjee* (1), *Haradhun Gossamee v.*

(1) *Before Mr. Justice L. S. Jackson
and Mr. Justice Miller.*

The 12th March 1872.

BHYRUB MUNDUL AND OTHERS
(DEFENDANTS) v. GUNGARAM BON-
NERJEE (PLAINTIFF).*

*Co-sharers—Suit by one, for separate
share of Rent—Parties—Landlord
and Tenant—Enhancement—Speci-
fication of Land.*

Baboo Taruck Nath Sen for the
appellants.

Baboo Anund Chunder Ghosal for
the respondent.

THE judgment of the Court was
delivered by

JACKSON, J.—The plaintiff in
this case is one of two joint owners
of a house occupied by the defendants.
The plaintiff singly sued the defendants
for an enhanced rate after notice of
rent to the extent of his own share.

The defendants in their defence
objected to the plaintiff's suit on the
ground that, as they were co-sharers,
and as the plaintiff was one of them,
of which the plaintiff was one,
enhancement was not maintainable.
The plaintiff could not be maintained
set up a *mokarram*.

* Special Appeal, No. 1140 of 1871, against the decree of the
Zilla Chota Nagpore, dated the 15th June 1871, affirmed by the
Assistant Commissioner of Maunbhoom, dated the 24th of

Ram Newaz Missery (1), and *Indromonee Burmonee v. Suroop Chunder Paul* (2). On the other side were cited :—*Jagadamba*

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further objected to the rates claimed by the plaintiff.

The plaintiff, however, obtained a decree in the Court of first instance, which decree has been confirmed by the Judicial Commissioner of Chota Nagpore.

In my opinion the plaintiff was not entitled to maintain this suit, he being one of two undivided joint owners, and the land in respect of which the suit was brought not being defined. It has frequently been ruled in this Court that, where the course has been to pay rent to co-sharers jointly, a single co-sharer will not be allowed to bring a separate suit for his share of the rent. The same rule appears to apply with still greater force to cases of enhancement. This is a principle which I think we should have the less hesitation in applying to the present case, because the facts appear to be such that, if we were deciding in regular appeal, we should not probably affirm the decision, for the plaintiff appears to have failed, to a great extent, in proving the rates claimed; and further, the defendants set up a *mokurrari* and there is fair reason to suppose, that they might have succeeded in proving that the plaintiff's father had attended to the rates, as he had been summoned to do.

It is therefore, that the decision of the Court below must be set aside, and the plaintiff's suit dismissed with costs.

The following is a decision of the B. L. R., 230.

(2) *Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.*

The 14th April 1871.

INDROMONEE BURMONEE (ONE OF THE DEFENDANTS) v. SUROOPCHUNDER PAUL (PLAINTIFF).*

Co-sharers—Suit by one, for separate share of Rent—Parties—Landlord and Tenant.

Baboo Grish Chunder Mookerjee for the appellant.

Baboo Sreenath Dass for the respondent.

NORMAN, C.J.—The plaintiff sues for arrears of rent for the years from 1273 to 1275 (1866 to 1868), to which he alleges himself to be entitled as being a shareholder in certain land held by the defendants comprised in two *jamas*, one of Rs. 106, and the other of Rs. 34. The plaintiff says that some time since he acquired by purchase first 1 anna 4 gundas of the lands comprised in these *jamas*, and subsequently additional fractional shares of this land, and that by these purchases, and by taking in farm 2 annas and 8 gundas, he became possessed in all of 6 annas 16 gundas of the property. Being their purchaser and ijaradar he sues the defendants, and amongst others the special appellant before us Indromonee Burmonee for the rents of 6 annas, after deducting 16 gundas which he says have been taken possession of by another party.

1898 of 1870, against the decree of the Additional Judge of 17th June 1870, affirming a decree of the Deputy Collector of 17th September 1869.

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DASSER.*Dasi v. Haran Chandra Dutt (1), Nanoo Roy v. Jhoomuck Loll Doss (2), Ganga Narayan Das v. Saroda Mohan Roy Chow-*

The lower Courts made a decree in favor of the plaintiff, from which decree the defendant Indromonee Burmonee appeals; and she points out through her vakeel that there is no evidence that she ever assented to any divisions of her liability, or agreed to pay the rents of the 6 annas 16 gundas, or of any other fractional share, to the plaintiff.

We think that the objection of Indromonee Burmonee is well founded; that the liability of herself and co-sharers was to pay the entire *jama* of Rs. 106 and Rs. 34 to the persons to whom they were liable to pay the same; and that the plaintiff by purchasing fractional shares of the property comprised within the *jamās* could not split up, without her consent, her entire liability, and make her liable to pay fractional shares of that rent to the several persons alleging themselves to hold shares in the zemindari, whose interests and rights she would have no means of ascertaining with accuracy. The suit, therefore, as regards the special appellant Indromonee Burmonee must be dismissed with costs in all the Courts. The other defendants not having appealed, the decree will stand as against them.

(1) 6 B. L. R., 526, note.

(2) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.**The 7th August 1872.*NANOO ROY (DEPENDANT) v. JHOO-
MUCK LOLL DOSS (PLAINTIFF).*

Co-sharers—Suit by one, for separate share of Rent—Parties—Landlord and Tenant—Objection taken for first time on Special Appeal.

This was a suit to recover arrears of rent of a 5-anna share of Mouza Bhóorh Coral for the years 1276 and 1277 F. (1869-70).

The defendant objected that he had never paid rent to the plaintiff, and that he held the land in question by virtue of his being a 1-anna *malik* in the village.

The Munsif dismissed the suit. The Judge on appeal said that the plaintiff had filed and proved certain *jamabandi* papers for the years 1276—1278, and that these papers proved clearly that the plaintiff was entitled to the rent claimed by him, and that his case was established by other evidence. He also held that the defendant had failed to prove that he was a shareholder. He accordingly reversed the decision of the Munsif and gave the plaintiff a decree.

On special appeal it was objected that the plaintiff, being owner of a share of the mouza and not the whole, could not sue for his share of the rent without making the co-sharers defendants.

Baboo Lukhychurn Bose
appellant.

The judgment of the Munsif
delivered by

Couch, C.J.—With
first objection, no suit.

* Application for the admission of a special appeal from the Munsif of Tirhoot, dated the 9th April 1872, reversing a decree of the Munsif of Darbhanga, dated the 18th December 1871.

dhry (1), *Hurkishor Das Bhooya v. Joogul Kishor Saha Roy* (2),
Umrit Chowdry v. Syud Hyder Alli (3), *Mahomed Sing. v.*

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to have been raised in the defence in the first Court. If the defendant had objected that the plaintiff was only entitled to a share, and could not sue without the co-sharers joining, it is possible that the plaintiff might have shown a state of things which entitled him to sue without joining the co-sharers. The case has gone through both Courts, and now that objection is taken. It cannot be allowed to be taken now, because from its not having been taken at the proper time, this Court has not before it the materials upon which it can determine whether it is a valid objection. We cannot in special appeal say that there has been any error in this; if it had been taken in the first Court, it might have been met, or the Court might have allowed the other parties to be added, or the suit to be withdrawn with liberty to bring a fresh suit. The defendant is now seeking to set up a different kind of defence from what he did before; and moreover, according to the finding of the Appellate Court, which is the fact whose judgment upon the facts we are to take as the prevailing decision, it would seem that he is liable to a share of the rent to the plaintiff, and the objection that the plaintiff has joined others with him is one which goes to the merits of the case. It is not shown that the defendant might not have his rent. The objection must be rejected.

R., A. C., 230.

(2) *Before Mr. Justice Bayley and Mr. Justice Paul.*

The 24th November 1871.

HURKISHOR DAS BHOOYA (ONE OF THE DEFENDANTS) v. JOOGUL KISHOR SAHA ROY (PLAINTIFF).*

Co-sharers—Suit by one, for separate share of Rent—Parties—Landlord and Tenant.

Baboo Grishchunder Ghose for the appellant.

Baboo Sreenath Banerjee for the respondent.

The judgment of the Court was delivered by

PAUL, J.—In this case the plaintiff jointly with others obtained a decree for a kabuliati from the defendants, with the exception of the three defendants who do not appeal. A kabuliati was decreed to be executed jointly by all the defendants in favor of the plaintiff, together with other shareholders who were joint plaintiffs in that suit. The plaintiff now sues for his individual and separate share of certain rents partly composed of the enhanced rent decreed in the first suit, and it is pleaded against him that his suit is informal, and cannot proceed on the ground that the defendants are jointly liable for the arrears sued for, and that, all the shareholders not being made parties, the suit must fail.

This objection is valid in law. The special appeal is therefore decreed, and the plaintiff's suit dismissed with all costs.

W. R., Jan. to July 1864, Act X. Rul., 63.

674 of 1871, against the decree of the Officiating Judge of Zilla
 11th March 1871, modifying a decree of the Deputy Collector of
 8rd September 1870.

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Mussamut Mughy Chowdrain (1), and *Ramjoy Sing v. Nazeer Gazeer* (2). The objection was not taken in the first Court, but this seems to be immaterial, as the other co-sharers were made defendants, and the plaintiff could not compel them to join her as plaintiffs.

The question which arises is whether the suit can be maintained, and as we differ from the decisions that it cannot be maintained, we refer this appeal for the final decision of a Full Bench.

Baboo *Kalimohun Doss*, for the appellant, contended that a suit for rent must be brought by all the co-sharers jointly. Each one of the co-sharers is not entitled to sue separately for his share of the rent, unless there be a contract on the part of the tenant to pay to each his share separately. Nor is it shown that, as a matter of fact, the plaintiff ever recovered any rent from the tenant. The tenant denied the plaintiff's title, and said that she had paid the rent to the agents of the other defendants Gour Chand and Lall Chand.

Baboo *Bharut Chunder Dutt*, for the respondent, contended the plaintiff having made her co-sharers defendants, there could be no possible objection to the suit.

Baboo *Kalimohun Doss* in reply.

The cases cited in argument were the same as those referred to in the order of reference to the Full Bench.

The following judgments were delivered by the Full Bench.

KEMP, J. (after stating the question referred, continued) I am of opinion that the present suit can be maintained. The plaintiff sues for rent of the years 1277 and 1278 (1871 and 1872) alleging that she is jointly in possession of a share in the property and has further to receive the rents in proportion to her share. She has made her co-sharers defendants in the suit.

(1) 1 W. R., 253.

(2) 5 W. R., 4.

defendant No. 1, the ryot, altogether repudiated the plaintiff's title, and alleged that he had paid the whole of the rents for the years 1277 and 1278 to another party,—namely, the defendant No. 2. The defendant No. 2, a co-sharer, also disputed the plaintiff's title, and stated that the plaintiff never lived in commensality with him, and that she has never received any rent from the defendant No. 1, the ryot. Both Courts have found on the evidence that the plaintiff has all along received rent up to the date preceding that of the institution of the suit. They have also found that the defendant, the ryot, was called upon by the plaintiff to pay rent, and that the defendant No. 1, the ryot, knowing that the *sarbarahkar*, to whom he had been paying the rent, had been discharged by the plaintiff, withheld payment of the rent of plaintiff's share. Under these circumstances I am of opinion upon the findings of fact of the two lower Courts, and inasmuch as the co-sharers have been made defendants, that the suit is maintainable.

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JACKSON, J.—I am also of opinion that the present suit is one which the plaintiff was entitled to maintain. There is a class of suits somewhat resembling the present, in which I have, on several occasions, expressed an opinion that the plaintiff is not entitled to sue separately,—that is to say, where several persons are jointly entitled to receive rent from a ryot, and having been accustomed to receive such rent jointly, afterwards one or more of them brought separate suits against such ryot in respect of their separate shares. In those cases it was held that the nature of the contract or holding being such that the ryot was accustomed to pay his rent in one sum to the joint owners, he ought not to be harassed by being sued in several suits in respect of portions of the same claim. Here the facts are different. The owners, it is true, have been accustomed to collect the rents jointly (at least I understand that they were doing so) and by a joint agent, but the parties who were defendants along with the ryot had subsequently, with his consent, their own separate shares in the suit which the plaintiff brought was in respect of an arrear, which arrear corresponded

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with her own share of the rent which the ryot had vexatiously and collusively refused to pay. That amount still remained unpaid, and the plaintiff being entitled to it, it seems to me that she was justified in bringing this suit, making at the same time the other co-sharers parties as defendants. In point of fact the conduct of the defendant was not that of a ryot who complained of being subjected to several suits in respect of one claim, it was that of a ryot entering into collusion with two out of three co-sharers for the purpose of depriving the third. Under these circumstances it is difficult to see what other course was left to the plaintiff than to sue these parties in order to recover that which was justly due to her, and to her alone. I therefore think that the suit was properly maintainable.

GLOVER, J.—I concur in thinking that, under the circumstances of the case, the suit was maintainable, and I do so generally for the reasons given by Kemp and Jackson, JJ.

PONTIFEX, J.—Under the circumstances of this case, I think there is no doubt whatever that this suit is properly maintainable; and as at present advised, I am not prepared to say when a ryot is holding under co-sharers, but not under a written contract, that one of the co-sharers cannot sue separately for his share of the rent, if he makes the other co-sharers defendants.

COUCH, C.J.—I concur in the opinion that has been expressed that the present suit is maintainable. That was my opinion when the question was referred to the Full Bench. The suit will be dismissed with costs.

PRIVY COUNCIL.

BUNWARI LALL SAHU (DEPENDANT) v. MOHABIR PERSAD
SINGH AND OTHERS (PLAINTIFFS).

P.C.*
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Dec. 18.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Act XI of 1859, s. 5—Attachment—Sale for Arrears of Revenue.

Act XI of 1859 is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of former Statutes, whereby the Crown was empowered to sell estates for non-payment of revenue.

S. 5 of the said Act applies to estates which are under attachment issued under Act VIII of 1859, and which are in the hands of a manager appointed on the application of the judgment-debtor for the purpose of liquidating the debts. Such attachments are not superseded by the appointment of such manager.

The words "arrears of estates under attachment" apply to cases where a portion only of an estate is under attachment, as well as to cases in which the whole estate has been attached.

MOHABIR Persad Singh, Kunla Persad Singh, Ram Subul Singh, and Dinobundhu Singh, the present respondents, were, with other persons, entitled to distinct but undivided interests in certain mehals called Malick Allypore Buzurg Sonapore Rudur, parts of Pergunna Balaghur, situate in the district of Tirhoot. The respondents had not, as some of the co-proprietors had, opened separate accounts in the mehals as to their separate interests, under s. 10 of Act VIII of 1859.

No money were obtained against the respondents from their co-proprietors, and a *sarbarahkar*, or manager, was appointed on the petition of the judgment-debtors of their estates under s. 43 of Act VIII of 1859, in order to satisfy the arrears out of the rents and profits. In September

SIR J. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR
R. P. COLLIER.

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1865, another manager was appointed. The Principal Sudder Ameen defined the duties of such manager at some length, and included therein those of collecting and enhancing rents, and paying the Government revenue due upon the respective shares. The manager continued in charge of the respondents' shares down to the date of the revenue sales hereinafter mentioned.

Malick Allypore was sold by reason of one of the co-proprietors, whose share was not under attachment, nor in the hands of a manager, having made default in payment of the Government revenue payable by him. Sonapore Rudur was also sold for the default of other co-proprietors, whose shares were not in the hands of a manager.

By an order dated 17th January 1867, five days after the last day fixed for the payment of arrears, the Collector caused notifications of the intended sale on the 16th February 1867 to be made, but not in accordance with the provisions of s. 5, Act XI of 1859. Notwithstanding some opposition, the sale proceeded, and on 16th February 1867 both mehals were knocked down for Rs. 1,40,000 and Rs. 48,000, respectively, to Ramjewun Lall, on behalf of the appellant. On the 7th June 1867, the Commissioner confirmed the sale, an appeal having been made by the respondents on the ground of irregularity and on the 14th June, certificates were granted in the name of the appellant.

On the 24th February 1868, the respondents sued *in forma pauperis* in the Court of the Principal Sudder Ameen of T. to set aside the sales. The grounds upon which they contended that the sales should be set aside were, 1st, that the Court having attached the properties, and placed them in the hands of a manager, the provisions of s. 5, Act XI of 1859 had not been observed, but were not; 2ndly, that the sale had not been duly made under s. 7, and that the revenue to be due was not actually due; 3rdly, that the authority to postpone the sale under s. 18, was not to be so used as to do so under the erroneous impression that he was so to do; and 4thly, that the sale was contrary to the provisions of s. 18, and involved heavy loss to the respondents. The Judge, on the 22nd December 1868, dismissed the application.

costs, holding that s. 5 did not apply. On the 3rd May 1870 the High Court (Bayley and Markby, JJ.) reversed the decree, and remanded the cases under s. 354, Act VIII of 1859, to try whether the respondents had sustained a substantial injury by reason of the irregularity that no notice had been issued as required by s. 5 of Act XI of 1859. On the 13th September 1870, the Subordinate Judge found that the respondents had sustained substantial injury by reason of the irregularity complained of, which finding was confirmed by the High Court (Jackson and Ainslie, JJ.) on 31st January 1871.

The defendant appealed to Her Majesty in Council.

Mr. *Cowie*, Q.C., and Mr. *Doyle*, for the appellant, contended that s. 5 of Act XI of 1859 did not apply to the sales in question in these suits, and that there was consequently no irregularity in the sales. That section contemplated sales "of estates under attachment, by order of any judicial authority, or managed by the Collector in accordance with such order." The manager in these cases was appointed at the request and for the benefit of the judgment-debtor, and was in no respect an attachment officer. His possession was, in law and in fact, that of the judgment-debtor himself, and was not such an attachment as falls within the words of the section. The section contemplated estates under attachment by the Collector. The learned Counsel further contended that there was no sufficient evidence that the mehals were sold below their real value by reason of such want of notice as that complained of, or that in fact the prices obtained were substantially below the real value. Further, as regards the respondent Ram Tuhul, he pointed out that he had allowed a creditor to be paid out of the surplus proceeds of the sale of Malick Allypore, Rs. 4,970-9-3; they contended that that was equivalent to a receipt by himself of a portion of the purchase-money, which enabled him under s. 33 of Act XI of 1859 from the irregularity of the sale of that mehal.

and Mr. *Macnaghten*, for the respondents, contended that the sales in question were irregular, and that the irregularity resulted therefrom.

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The judgment of their LORDSHIPS was delivered by

SIR R. P. COLLIER.—These cases, in which the parties are the same and the facts are the same, turn upon a point of law which admits of being very shortly stated. The plaintiffs bring their suit for the purpose of setting aside a sale for arrears of Government revenue. The plaintiffs are the owners of separate shares of the estate in question. Certain decrees had been obtained against the plaintiffs, and attachments had been issued under Act VIII of 1859, some years prior to the sale in question. Upon the application of the plaintiffs themselves, a *sarbarahkar*, or manager, was appointed for the purpose of liquidating the debts. It does not appear to their Lordships that anything turns upon the appointment of this *sarbarahkar*. It was, indeed, argued in the Court below, though scarcely contended for here, that the appointment of the *sarbarahkar* superseded the attachments. Their Lordships are of opinion that the attachments were not so superseded, but were in force.

That being so, the estates being thus under attachment, with the exception of one portion belonging to a party of the name of Gurudoyal, the question arises whether or not the provisions of s. 5 of Act XI of 1859 apply to this case. This enactment provides "that no estate, and no share or interest in any estate, shall be sold for the recovery of arrears or demands of the descriptions mentioned below, otherwise than after a notification in the language of the district, specifying the nature and amount of the arrear or demand, and the latest date on which the payment thereof shall be received, shall have been a notice of a period of not less than fifteen clear days preceding the day for the payment, according to s. 3 of this Act, in the presence of the Collector or other officer duly authorised to hold a court under this Act, in the Court of the Judge within whose jurisdiction the land advertised lies, and in the Munsif's Court of the Thanna of the division in which the estate is situated." It is no question that this notice was not in proper form. The only question that arises is, whether this notice was sufficient for the sale of this estate, and in order to determine this question

sary to read to the end of the section. The arrears or demands described below are :—" First, arrears other than those of the current year or of the year immediately preceding ; secondly, arrears due on account of estates other than that to be sold ; thirdly, arrears of estates under attachment by order of any judicial authority, or managed by the Collector in accordance with such order." The arrears for which the estate in question was sold, were neither of the first nor of the second descriptions ; the only question is whether they fall within the third.

Now in this case the estates were not held under attachment by the Collector of the district, and it has been argued that this provision applies only to the case of estates being held under attachment by the Collector. But their Lordships are of opinion that to place such a construction upon the words of the Act would unduly limit their plain meaning ; and it may be observed that this is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of the former Statutes, whereby the Crown was empowered to sell estates for non-payment of revenue. The words of the Act are " arrears of estates under attachment by order of any judicial authority." These words would *prima facie* apply to all attachments by judicial authority under Act VIII of 1859, which had been passed some two months before in the same session of the Legislature, and it is difficult to suppose that the Legislature, having passed that Act, should, in a subsequent Statute referring to attachments, intend to omit a reference to attachments which previous legislation had regulated.

It has been said that the second portion of this sentence " or managed by the Collector in accordance with such order " applies to attachments as well as to the mere management by the Collector of estates. But it appears to their Lordships that the construction necessarily follows. They think that the clause, " arrears of estates under attachment by order of any judicial authority," should be read by itself, and that the general significance which I have ascribed to the terms " managed by the Collector in accordance with such order " would refer to cases in which the

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Collector may manage estates by an order of judicial authority, which may or may not be an order for an attachment. By this construction both parts of the sentence would cohere; and it does not appear to their Lordships that the latter words narrow the plain and obvious meaning of the former.

An argument has been drawn from s. 17 for the purpose of limiting the meaning of the words in s. 5. But their Lordships would observe in the first place that s. 17 refers to a different subject-matter; it refers not to notices to be given, but to certain cases in which estates are not liable to sale at all. The words relied upon are these:—"And no estate held under attachment, or managed by a Revenue Officer, in pursuance of an order of judicial authority, shall be liable to sale for the recovery of arrears of revenue accruing during the period of such attachment or management, until after the end of the year in which such arrears accrue." It may be that in this section the words "held under attachment," may refer to "held under attachment by a Revenue Officer;" and it may be observed that where the Legislature intend to express this meaning, they have used apt words, they have used the words "held under attachment by a Revenue Officer;" but the circumstance of their having used these words in this section, and having omitted them in the former, tends to strengthen the inference that their meaning in the former was different from what it was in the latter section. The words of the Act being plain, it is not necessary to speculate upon the reasons which may have induced the Legislature to pass them; but if such reasons were to be sought, one need not go far to go for them. A creditor obtaining an attachment under Act VIII had an inchoate interest in the land; he could not alienate it, and no judgment-creditor, even if his claim were prior, who obtained subsequent execution, could have any rights against him. It may be said that the land was virtually in the custody of the law. That is true. The judgment-creditor had an obvious interest in the land, whether or not the revenue was paid; in other words, in the land, whether or not the estate in which he had an interest was sold. It may well be that the Legislature may have been influenced by those circumstances, he was entitled to be

estate was or was not liable to forfeiture, in order that he might step in, as he might under s. 9 of the same Act, and pay the revenue and prevent the forfeiture.

It has been further argued that the words "arrears of estates under attachment" must refer to estates, the whole of which are under attachment, and that if any portion or any share of an estate, however small, is not under an attachment, the clause does not apply. In their Lordships' opinion, this would be to place again an unduly narrow construction, and to limit the meaning of plain words. It appears to their Lordships that an estate, any portion of which is under attachment, cannot be said to be free from attachment, and is, in fact, subject to attachment. The reasons why the Legislature should direct information to be given to a creditor would apply as much to the case of the creditor having a lien on a small, as to one having a lien on the whole, or a large part of the estate.

Entertaining this view, their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that this judgment be affirmed, and the appeal dismissed, with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins and Lattey*.

Agents for the respondents: Messrs. *Harrison, Beal, and*
n.

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July 3, 5, 8.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Res judicata—Act VIII of 1869, s. 2.—*Cause of Action.*

C, a Hindu, subject to the Mitakshara law, adopted *S* and afterwards *B*, and made a will whereby, after providing for his widow, the family worship, &c., he made a division of his real and personal property between his two adopted sons. Provision was also made for forfeiture by either of the sons in case they disputed the will, in which event the whole estate was to go to the other son. This will was registered and filed in the Collector's Court. *S* was subsequently disowned by *C*, and declared to have forfeited his right to anything under the will. In 1869, *S* brought a suit against *C*, *B*, and certain persons who claimed portions of the property under deeds executed by *C*, to cancel those deeds, to cancel the will, to set aside the adoption of *B*, and for maintenance. In this suit he alleged that *C* had no power to make any of the devises of real estate contained in the will, inasmuch as the whole estate, consisting of property inherited by *C* and property acquired by him from the income of such inherited property, was ancestral. The only issue raised in that suit referring to the will was whether it was assented to by *S*. The first Court found that it had been so assented to; that the adoption of *B* was valid; and that *S*'s conduct justified *C* in disinheriting him. The suit was accordingly dismissed. *S* appealed to the High Court and in his grounds of appeal raised the same contention as before, viz., that the whole of the real property was ancestral, and therefore *C* had no power to dispose of it without his consent. The High Court, in 1868, varied the decree of the first Court, and held that the will must be set aside so far as it affected the right of *S* in the ancestral property, but that the property only included that inherited, and not that acquired by *C* from the income of the inherited property. In a suit brought by *S*, after the death of *B* and *C*, against *B*'s widow and the parties to the former suit, representatives, to obtain possession of the whole estate of *C*, it was held that both the inherited property and the property acquired from the income thereof were ancestral.

Held (reversing the decision of the High Court), that the issue as to the assent of *S* to the will clearly embraced the determination of the controversy between the parties, the Court was bound, and indeed was bound, to decide whether or not the will was valid as to all or to any and what portion of the property. The decision on that point was binding on the parties.

* *Present*:—SIR J. COLVILLE, SIR B. PRACOCK,
COLLIER, *Assessor*, AND SIR I.

According to the general law relating to *res judicata*, where a question has been necessarily decided in effect, though not in express terms between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form.

S. 2, Act VIII of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action.

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APPEAL from a decision of the High Court at Calcutta (Loch and Hobhouse, JJ.), dated the 5th May 1869, modifying a decree of the Principal Sudder Ameen of Cuttack, dated the 27th April 1864.

The facts of the case were as follows:—

Chuckurdhur Mohapatter, a Hindu, subject to the Mitakshara law, adopted, first, Suddanund, the respondent in this appeal, and subsequently one Bonomalee. On the 5th of April 1849, Chuckurdhur registered a will, whereby, after making provision for his widow, the family worship, &c., he gave a nine annas share of his real estate to the respondent, and a seven annas share to Bonomalee, dividing his personal property equally between them. "Should either of the sons," the will concluded, "bring any action in any Court in opposition hereto, then he shall forfeit his right of adoption, and his right and title to the share specified in the deed of division, as a disqualified son, and no other son shall be entitled to the entire sixteen annas." The respondent, on the will being presented for registration, raised various objections to its being registered in a petition presented to the Registrar of Deeds, in which he denied all knowledge of its terms and of the second adoption, and objected to the privation of his rights. On the 3rd February 1857, a petition was presented in the Collector's Court, purporting to be signed both by the respondent and Bonomalee, containing an admission and consent by both of them, of the validity of the will. But later in the same year, violent dissension between Chuckurdhur and the respondent, led to two petitions in the Collector's Court, stating in substance that the respondent was not his son, and that the will was a case of disinheritance in the will. In January 1859, the respondent instituted a suit

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against his father, Bonomalee, and certain persons who claimed portions of the property under deeds executed by the father for the purpose of setting aside those deeds, the will, and the adoption of Bonomalee, and for maintenance, and a declaration that his father's repudiation of him as a son was illegal. In his plaint he denied his father's right to alienate the property, alleging that no portion of it was self-acquired, but that the whole of the property was either inherited by Chuckurdhur from his father, or was purchased out of the proceeds of such inherited property. Chuckurdhur, in his written statement, maintained that his repudiation of the respondent was rendered lawful by the latter's own disgraceful and hostile conduct; that the second adoption was legal; that he had the right to alienate the property; and that the respondent had assented to the will. He also denied that all the property purchased by him was purchased solely from the profits of ancestral estate. The respondent in his written statement joined issue on the last point.

On the 6th March 1860, the Principal Sudder Ameen dismissed the respondent's suit, holding that the Hindu law allowed two adoptions, and that the adoption of Bonomalee, therefore, was valid; that the respondent's conduct justified Chuckurdhur in disowning him; and that he had assented to Chuckurdhur's will. Chuckurdhur died on the 17th August 1861.

The respondent appealed to the High Court from the judgment of the Principal Sudder Ameen, on the ground, among others, that all the property was ancestral, and was inalienable by Chuckurdhur, except with the respondent's assent. The High Court (Campbell and Pundit, JJ.), on the 12th February 1863, reversed the decision of the Principal Sudder Ameen so far as it declared the adoption of Bonomalee and the disinherison of the respondent valid; and the respondent's will so far as it professed to deprive him of his share in the ancestral immoveable property, but refused to set aside the will so far as it related to the ancestral immoveable property, but refused to set aside the will so far as it related to the ancestral immoveable property. As to what constituted ancestral property, the court held that the Mitakshara law applicable to the case, the question of inheritance in the ancestral immoveable property was governed by the Mitakshara law.

the question was raised before us, we must declare that the ancestral property is only that actually inherited from ancestors, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property; for the income is the property of the tenant for life, to do as he likes with" (1).

On the 23rd of November 1863, Chuckurdhur and Bonomalee being both dead, the respondent brought the present suit in the Court of the Principal Sudder Ameen against Soorjomonee Dayee, the widow of Bonomalee, and others, for possession of the whole of Chuckurdhur's estate, real and personal. He subsequently abandoned the claim as to personalty, but claimed the whole of the realty as ancestral property acquired by Chuckurdhur either by inheritance from his father or by purchase out of the proceeds of the inherited property. With respect to this Soorjomonee maintained that property purchased with the income of ancestral property was treated by the Mitakshara as self-acquired; and that the matter was a *res judicata*, having been decided against the respondent in the previous suit. And further, that a large portion of the property had been purchased from other sources than the income of ancestral property.

On the 27th April 1864, the suit was dismissed as regarded self-acquired realty, and all the personalty both self-acquired and ancestral, but decreed as respects the ancestral real estate. On appeal, a Division Bench of the High Court (Steer and Trevelyan, JJ.) differed in opinion, and the case was referred to Trevor, J., who, on the 26th September 1866, after the two other Judges had left India, held that the will was good for so much as the testator could will away; and, secondly, that property purchased by the joint fund followed the character of the fund from which it was the representation. On review of the Division Bench of three Judges (Loch, Hobhouse, and Trevelyan, JJ.) upheld the ruling of Trevor, J.; but being of opinion that the defendant should have an opportunity of showing that the real estate had been acquired

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(1) 3 Atkins, 626.

Mr. *Doyne* and Mr. *Cutler*, for the respondent, argued that there was no binding adjudication against the respondent in the previous litigation as to any of the properties now in suit; Act VIII of 1859, s. 2. No issue was raised in the former suit with Bonomalee either in his present or previous character. He stands on the devise in his favor. [SIR M. SMITH.—All the property in both the suits was the same. Mr. *Leith*.—The case of *Mussamut Mitna v. Syad Fuzl Rub* (1) shows that an issue is unnecessary if the point decided is raised by the pleadings.] Not merely was no issue raised, but nothing was done under the judgment by interfering with the possession. [SIR B. PEACOCK.—You do not contend that the clause in the will for disinheriting in case of the will being disputed is invalid.] No, it is admitted, on the authority of *Cooke v. Turner* (2) that such a contention cannot be raised.

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Counsel for the appellant were not called upon to reply.

Their LORDSHIPS' judgment was as follows:—

This suit was brought by Suddanund Mohapatter, as adopted son and heir-at-law of Chuckurdhur, against Soorjomonee Dayee, the widow of Bonomalee, the devisee of Chuckurdhur, to obtain possession of all the estate, real and personal, of Chuckurdhur. Two defendants were joined, but inasmuch as Soorjomonee is the sole appellant against the judgment, which was in favor of the plaintiff, the rights of the plaintiff as against Bonomalee were not to be considered. The claim to the personal property was not made by the plaintiff, nor did he dispute that Chuckurdhur had the right to dispose by will of all real property which was acquired by him; but he asserted that there was no real property; that all the real property of Chuckurdhur was either ancestral in the strict sense of the word (as required by inheritance from his father) or was the income of ancestral property, whereupon it

(1) 15 I. A., 573; S. C., 6 B. L. R., 146.

(2) 15 M. & W., 727.

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The defendant did not maintain that Chuckurdhur could devise his ancestral property, properly so called, but maintained that what he had bought from the income of ancestral property was, according to the Mitakshara law (which is admittedly applicable to this case) self-acquired, and disposable by his will. She further maintained that this very question had been decided in favor of Bonomalee in a previous suit between the plaintiff and him. She also contended that, in fact, a large portion of the property had been bought by Chuckurdhur from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by Chuckurdhur had been bought from the income of ancestral property: and, that being so, they ruled that, according to the Mitakshara law, he had no power to dispose of it by will.

The first question which arises in the cause is, whether or not it had been decided, in a manner binding upon the parties, that Chuckurdhur had the power to devise by will such real property as he had acquired out of the income of his ancestral property?

The suit in which this question is alleged by the defendant to have been so decided, was brought by the plaintiff against Bonomalee and others in January 1859, and judgment was given in it in 1863. It is not now denied by the Counsel for the respondent that this question was in fact decided by that judgment, but it is argued that the question was not decided as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultra vires*.

The facts necessary to make that suit intelligible are as follows:—

Chuckurdhur had first adopted the plaintiff, and then adopted Bonomalee. On the 5th April 1859, he gave to the plaintiff a nine annas share of his real estate, and to Bonomalee a seven annas share, dividing the remainder equally between them. The will contained a provision to the effect that if either devisee disputed

benefit under it. Chuckurdhur shortly afterwards published this will by filing it in the Court of the Collector.

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Violent disputes having arisen between the plaintiff and his father, in the course of which the plaintiff disputed his father's competence to make a will, Chuckurdhur, in 1857, filed in the same Court two petitions, the purport of which was that he disowned the plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it.

On the 14th January 1859 the plaintiff filed a plaint against his father, and against Bonomalee, and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of Bonomalee, for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the plaintiff was jointly entitled with him during his life; he further alleged that his father had acquired such property as he had not inherited, from the proceeds of his ancestral property, and that such property was therefore not ancestral; and in a schedule appended to his plaint, entitled "A schedule of the disputed property," he distinguished ancestral zemindaris from zemindaris acquired from the profits of the ancestral estate. The case of *Kanth Narain Singh v. Prem Chandra Maurey* (1), decides that it was competent for the plaintiff to institute such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disavowal of the will in these terms: "The plaintiff writes that I am incompetent to transfer ancestral estates by sale or gift, and that the will is void for the reversal of the will and the deeds of gift are void. This is his mistake, because I am the owner of the ancestral estates, ancestral and self-acquired, and have every power to dispose of them by sale or gift in various ways." He further alleged the fact that his purchases of land were made out of the profits of the ancestral estate.

On the plaintiff reasserted his right of

(1) 3 W. R., 102.

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inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will. He reasserted that all the estates of his father were ancestral estates, and none self-acquired according to Hindu law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being, whether or not it was assented to by the plaintiff, an issue clearly embracing but a portion of the controversy between the parties. That the question was, however, raised in the suit, appears not only by the pleadings which have been referred to, but by the grounds of appeal by the plaintiff from the decision of the Principal Sudder Amal which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the defendant had no power under the shastras to execute a will or wills. He says:—"all the properties moveable and immoveable are ancestral, and not the self-acquired property of my adopted father; therefore, according to the provisions of the Mitakshara shastra, gifts of even a portion of the property without the consent of your petitioner are illegal and improper. I am, therefore, in opposition to the grounds of appeal, that the will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the family."

If both parties invoked the opinion of the Lordships on the question, if it was raised by the pleadings, the Lordships are unable to come to the conclusion that the will is valid because an issue was not framed which

embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mussamut Mitna v. Syud Fuzl Rub* (1), wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

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Their Lordships are of opinion that the plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, *viz.*, ancestral property, and that derived from the income or profits of ancestral property; that this question was raised by the pleadings and treated by both parties as before the Court, and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal Sudder Ameen decided in substance in favor of the plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on the 28th February 1863, after the death of Chuckurdhur, and now becomes necessary to refer to the judgment given on appeal (2). After stating that "the present suit is brought by Suddanund for maintenance, to declare the adoption of the plaintiff as a son invalid and unlawful, to declare that the father's will is invalid, to declare the plaintiff as a son is illegal and beyond the power of the father, to declare the will and petitions disinheriting and inoperative, and to set aside certain deeds (with which we are not concerned at present,) the Court proceeded to say that the case involves several questions of Hindu law, and they thus divide those questions, and the status of Bonomalee, whom the plaintiff

(1) 13 M. 173; S. C., (2) See the report in Marsh., 417; and S. C., 2 Hay's Rep., 205.

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seeks to declare to be no lawful son of Chuckurdhur;" secondly, "the status of plaintiff who seeks to be declared a son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favor of the plaintiff on the question of adoption and status, they then proceed to deal with the question of property in these terms:—"With respect to the property, our decision must follow the decisions regarding personal status above laid down. By the Mitakshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it. On the other hand, the father has it in his power to dispose as he likes of all acquired and all personal property. Such, then, being the status of the parties, and such the law, we declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the plaintiff, the only son of Chuckurdhur, of his right to succeed to the whole ancestral immoveable property held by the said Chuckurdhur; but as regards all other property, so that Chuckurdhur was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far as the prayer of the plaintiff. There is not the least doubt by the petitions presented by Chuckurdhur, he unimpaired published his will and desire to deprive the plaintiff of his right to the property so far as he could deprive him of it to Bonomalee." They then deal with the question as to the will, which they find in favor of the plaintiff, and they proceed to say, "the father being dead, we have waived a decision of the claim to maintain the will with respect to the deeds of sale and gift sought to be set aside; the appellants must again go into Court to determine of the ancestral property, they are satisfied with the declaration that such deeds cannot affect the title, and that they are at liberty in any fresh

sion of all such ancestral property." In their Lordships' opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, viz., the cancellation of the will.

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The 2nd clause of Act VIII of the Code of Procedure of 1859 is in these terms: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle "*nemo debet bis vexari pro eadem causa*." This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to—*Gregory v. Gresham* (1)—in which Lord Hardwicke held that where a question was necessarily decided, in effect though not in terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in the same form: and that decision has been followed by a long series of decisions, the greater part of which will be found in the very able notes of Mr. Smith to the case of the *Kingston* (2).

These principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the plaintiff and the defendant—who, for this purpose, is the plaintiff's late husband—that Chuckerdhar's will is valid to dispose of all such real property as he

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had acquired out of the income of ancestral property. Their Lordships agree with the High Court that Chupkurdhur did in fact devise the property over which he had the power of disposition to Bonomalee; and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will, a clause which, according to the case of *Cooke v. Turner* (1), would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the judgment of the 28th of February 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed.

Considering that the complications which have arisen have been due in some measure to the manner in which Chuckurdhur himself dealt with his property, and that the Courts below, both that of the Principal Sudder Ameen and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this appeal, and before the High Court.

Appeal allowed.

Agent for the appellant: Mr. F. Graham.

Agents for the respondent: Messrs. Barrow and

(1) 15 M. & W., 727; S. C., 14 Sim, 493.

BODH SING DOODHOORIA AND ANOTHER (DEFENDANTS) v.
GUNESH CHUNDER SEN AND OTHERS (PLAINTIFFS).

P. C.*
1873
March 27.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Hindu Law—Joint Family—Separate Acquisition—Evidence—Act VIII of
1859, s. 260.*

In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree passed against the estate of *R*, one member of the family, for his separate debt, the defendant sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own; and that while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of *R*, viz., that during *R*'s lifetime the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when *R*, *B* the *kurta*, and a third member of the family, entered into a security-bond with the Collector, whereby *R* pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of co-sharers."

On the other hand the plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, and that the purchase was made in the name of *R* alone, filed the family account-books and the private account-books of *R* for the same purpose, as well as letters which passed between *B* and *R* relative to the purchase.

The evidence as to the separate trading, funds, and dealings of several members of joint family, and their independent dealing with property, disclosed such a state of things as might be fairly held to rebut, the ordinary presumption of Hindu law as to the separate property of one member of a joint family, and to throw upon the defendant the burden of establishing the joint nature of the property claimed.

ON BEHALF SIR J. W. COLVILLE, SIR B. PEACOCK, LORD
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2ndly, that the provisions of s. 260, Act VIII of 1859, apply to ordinary *benami* purchases at execution-sales, but do not affect purchases of property by one member of a joint Hindu family in his own name, but with the joint funds;

3rdly, that the mere fact that *R.*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the defendant the purchaser at a sale in execution of a decree against *R.*, their own share of such estates;

4thly, that the misrepresentation as to his separate ownership made by *R.*, in the security-bond given to the Collector, could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the plaintiff, the defendant not having purchased on the faith of such misrepresentation;

5thly, that the letters between *B.* and *R.*, relative to the purchase by the latter of the estate in dispute, were admissible as against the defendant.

APPEAL from a judgment of the High Court (Loch and Glover, JJ.), dated the 29th June 1868, affirming two judgments of the Principal Sudder Ameen of Moorshedabad, dated the 26th February 1867.

The appellants, defendants in this suit, were the purchasers of the right, title, and interest of the heirs of one Ramsunder Sen in two estates, called Shahjehanpore and Cossipore, which were sold in satisfaction of decrees obtained against Ramsunder Sen for his separate debt.

The respondents, plaintiffs, brought these suits to recover possession of a share of the estates of Shahjehanpore and Cossipore, to which they claimed to be entitled as members of the joint Hindu family with the funds of which the estates in dispute were, as they alleged, originally purchased, though the purchases had been made in the sole name of Ramsunder Sen. The respondents, said to be co-sharers with the plaintiffs, did not appear as plaintiffs in the suit, and were made defendants, but neither Benoderam Sen the *kurta* of the joint family, nor Ramchunder the brother of Ramsunder were parties. The suit was originally brought for the shares claimed by the plaintiffs in both estates, but the suit was subsequently amended to two, as some of the defendants were interested in one of Shahjehanpore.

The defendant Benoderam Sen was, as alleged, the head and managing member of the joint family.

lived at the family dwelling-house, at Koredha in Beerbhoom, at some considerable distance from the estates in suit, which both lay in the zilla of Moorshedabad.

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With respect to the estate of Shahjehanpore the facts were as follows:—

Ramsoonder Sen had, for many years before his death, held the office of treasurer and dewan to the Nawab Nazim, and he resided and carried on business as a money-lender and banker at Khagra, near Moorshedabad.

About 1856, Ramsoonder took a patni of Shahjehanpore in his own name from one Raja Soorjonarain Sing, and the Raja having subsequently borrowed Rs. 8,000 from Gunganarain Sen, another member of the family, executed an assignment, by which Ramsoonder was to pay out of his patni rent Rs. 1,500 to Gunganarain towards satisfaction of the debt. In 1859, another creditor of the Raja, having sued out execution of a decree against him, Ramsoonder, after having put in a petition to protect his own interest as patnidar, attended the sale, and, on the 4th July 1859, bought and paid for ostensibly with his own money, and in his own name as purchaser, the estate of Shahjehanpore, and was said to have obtained a sale certificate for the same.

From the time of his purchase, down to his death in December 1862 or January 1863, Ramsoonder, in all respects, acted as sole proprietor of Shahjehanpore, granting leases, and litigation, both as defendant and plaintiff, asserting his title to the estate. When Ramsoonder died, he was indebted, and suits were pending against him. In January 1863, Benoderam petitioned the Col. for transfer of Shahjehanpore into his name, alleging that he had purchased, in the name of Ramsoonder, the share in the estate of the latter, who was his nephew. Ramchunder Sen, Ramsoonder's nephew, had, on the death of the latter, obtained the administration of his estate, which in his application to the Col. he represented as consisting of "zemin-dari" and "Company's paper" of the value of about Rs. 10,000. Benoderam's petition was assented to by the Col. in Benoderam's presenting his petition, and the Col. assenting to Benoderam's claim,

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and an order was accordingly made as prayed in May 1863. About this time various judgment-creditors of Ramsoonder were seeking for execution of decrees obtained against him or his estate, and among them certain persons, Seetulchund Settya and others, had applied for the attachment of Shahjehanpore, on the allegation that it formed part of Ramsoonder's estate, and attachment accordingly issued. In September 1863, Benoderam Sen petitioned the Principal Sudder Ameen for the removal of this attachment, on the ground that Ramsoonder had no interest whatever in Shahjehanpore, which had been bought with the petitioner's money. He did not then set up the case that the whole joint family, including Ramsoonder, were interested in Shahjehanpore, but alleged, that it was solely his. This claim was, on the 20th September 1864, rejected by the Principal Sudder Ameen, and an order was made for the sale by auction of Shahjehanpore, in satisfaction of the decrees against Ramsoonder Sen. The plaintiffs do not appear, during the pendency of those proceedings, or before the execution sale at which the appellants purchased, to have come forward or given any notice of their alleged title or claim. The sale in execution of Shahjehanpore took place on the 2nd November 1864, when the right, title, and interest of Ramsoonder Sen therein was sold for Rs. 40,300, or nearly three times the price paid five years before by Ramsoonder, to the appellants, and a third party, who was defendant below, Gopalchund Settya. Possession was delivered to the plaintiffs without any opposition on the plaintiffs' part of their interest in Shahjehanpore, which had stood in Ramsoonder's name.

As to the estate of Cossipore, the following were the facts.

In September 1855, Ramsoonder Sen applied to the Principal Sudder Ameen of Moorshedabad for the registration of his purchase of four annas of Cossipore from one Shibram, the then proprietor, and in April 1856, he made application with regard to the remaining twelve annas, which had been purchased by him from one Shibram. These purchases were accordingly registered in his name. Ramsoonder Sen pledged Cossipore to Government.

Collectorate treasurer, and at the same time Benoderam and Brojomohun, one of the plaintiffs, pledged other properties, each property being described as being in the possession of the pledger "without the right of any co-sharers." In May 1862, the Collector having directed his Nazir to make inquiries whether Ramsoonder was in the undisputed possession of Cossipore, the Nazir reported that "Ramsoonder Sen is in possession of the mehal, mentioned in the order, without any co-sharers." Ramsoonder appears throughout to have dealt with Cossipore as if he alone had an interest in it. On the death of Ramsoonder, Benoderam, on the 15th January 1863, presented a petition similar to the petition presented by him with regard to Shahjehanpore, alleging that he had purchased Cossipore in Ramsoonder's name; and Ramchunder in this case also admitted the validity of the claim set up by Benoderam, and thereupon, notwithstanding objections made by the judgment-creditors, Benoderam in May 1863 obtained an order for the transfer of it into his name. In October 1863, the creditor of Ramsoonder, at whose suit Shahjehanpore was sold, having caused Cossipore also to be attached in execution of his decree against Ramsoonder's estate, Benoderam petitioned for the removal of the attachment on the same allegations as those made by Ramchunder, viz., that Ramsoonder had no interest therein, and offering to prove the production of private account-books and income-tax receipts. The Principal Sudder Ameen rejected this claim, and on the 1st of November 1864, Cossipore was sold by auction to the appellant, Bodh Sing Doodhoooria, alone for Rs. 19,000, or nearly Rs. 19,000 more than it had been worth by Ramsoonder Sen. The present suit was instituted on the 1st of August 1865.

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It was submitted that the purchasers were, under the circumstances, entitled to retain the share of Ramsoonder, and that the other members of the joint family, inasmuch as they were part of their family, properties acquired with their property, and these had been so acquired, had known nothing about the sales in question. In support of their case as to both

The judgments were the same, except as regards the question which was confined to Shahjehanpore, as to the effect of the certificate given to Ramsouder Sen, as to which the Principal Sudder Ameen held that the purchase being before the promulgation of Act VIII of 1859, the 260th section was not applicable.

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As to the main question of fact, viz., whether the estates in suit were purchased out of joint funds, the Principal Sudder Ameen held that as the defendants did not deny that the plaintiffs were members of a joint Hindu family, the burden was on them to prove that Ramsouder had bought out of separate funds; and that, they having failed to show this, the estates must be considered to be joint.

The High Court, on appeal from these decisions, on the 29th June 1868, delivered one judgment, as to the two estates, dismissing the appeals.

The material portion of the judgment, which was delivered by Loch, J., was as follows:—

“The question that we have to determine is whether the property in suit was the self-acquired property of Ramsouder Sen, in which the plaintiffs, members of the family, have no interest; or whether it was purchased by the joint funds of the family in the name of Ramsouder? There are two subordinate questions which are urged by the learned counsel for the appellants: first, that the evidence upon which the Principal Sudder Ameen has relied, consisting of letters between members of the family, and certain account-books, is inadmissible as against the defendants, appellants; and, second, that the doctrine of acquiescence is applicable to this case.

The defendants, appellants, have, we think, sufficiently discharged their burden upon them of making out a good *prima facie* case that the property was the sole property of Ramsouder Sen. Lot 1 was first taken in patni in the name of Ramsouder. It was purchased in the name of Ramsouder; leases and mortgages were given in his name; and when Sreekishen Sen, was appointed treasurer of the Collectorate of Benoderam and Benoderam, Brojomohun and Bissessur were his sureties, and pledged certain properties as security for him exclusively. Among these properties was one of another suit similar to the present, and

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taken up with this suit in order that the evidence recorded might be made use of in both cases ; consequently no inference can be drawn from the fact of the family having some joint property, that all property, in the names of the several members of the family, belong to the family. It has been further shewn to us that, after Ramsoonder's death, Benoderam applied to have his name registered as proprietor of this estate and of Cossipore ; that when this estate and Cossipore were advertised for sale in satisfaction of the claims of the judgment-creditors, Benoderam came forward and claimed this property as exclusively his own, alleging that he had purchased them in the name of Ramsoonder. The evidence of the witnesses and of those members of the family who have been examined clearly shows that, though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindu family in the ordinary sense of the term,—that is, as a family having all things in common ; all acquisitions being made from the joint funds of the family ; and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds, and dealt with it as their own with reference to the other members of the family. It is obvious how Ramsoonder obtained a separate fund of his own. He held the post of treasurer to the Nawab Nazim, and in that capacity had all opportunities of making money to which the members of the family could have no possible right, so that in this case the ordinary presumption does not arise that, when a Hindu family is joint, all property in the name of any members of the family is joint property."

The learned Judge then proceeded to comment at considerable length on the evidence. He was of opinion that the evidence was not admissible as against the defendant, as the accounts were unsatisfactory, but he considered that the evidence proved the estates to have been joint, and he concluded :—

"On the whole, therefore, I think that the Principal Sudder Ameen, that these properties at Cossipore are family property, and that they

soonder Sen exclusively, and that the auction-purchaser has bought the rights and interests of Ramsoonder Sen in these properties, and nothing more, is a correct one, and under this view of the case, I would confirm the order of the Court below and dismiss the appeal with costs."

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The defendants appealed from this decision to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *Doyle* for the appellants.—The Principal Sudder Ameen was wrong in not applying s. 260 of Act VIII of 1859 to the case. The purchase of Shahjehanpore was three days after the 1st July 1859, the day on which the Act came into operation; s. 387. The High Court having held that the appellants had made out a *prima facie* case, and that the account-books produced by the plaintiffs did not support their contentions, erred in relying upon the oral evidence. The whole family stood by and allowed the property to be considered as the separate estate of Ramsoonder. Benoderam, the manager of the joint family, on Ramsoonder's death, claimed the property as his own, and another member of the family, Ramchunder, admitted it. Then at the time of the attachment, Benoderam, the manager, never set up his claim of the joint family. The appellants are allowed to pay a very large price this property, and the manager of the family having then set up a false case, which the family were known of, the joint family is clearly estopped from setting up a different case. But even if there were no estoppel, their conduct is a bar to their obtaining relief in the High Court. Eq. Jur., ss. 384—390. If these estates were sold, were not the debts those of the joint family; would the plaintiffs now set aside the sales? The appellants were misled by Benoderam's fraud, and this fraud, if proved, will go to the joint family, and Benoderam will be benefited.

Mr. *Cutler* for the respondents.—The High Court was right; indeed, the High Court might have properly given effect to the letters and the influence between members of the family

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and Ramsoonder would be evidence as against the purchasers of Ramsoonder's interest. The lower Courts have agreed in the facts.

Their LORDSHIPS gave the following judgment:—

On the 21st of November 1864, the appellants became the purchasers, at an execution sale, of the right, title, and interest of one Ramsoonder Sen in two distinct estates, *viz.*, Shahjehanpore and Cossipore. Both had been attached by one Inderchunder Doogur in execution of a decree which he had obtained against the representatives of Ramsoonder in a suit commenced against that person in his lifetime for what is admitted to have been his separate debt. The price paid by the appellants would have been adequate if the judgment-debtor had been the sole owner of the properties purchased. In August 1865, the respondents, representing themselves to be the persons who jointly with the sons of Ramsoonder, his brother Ramchunder, and one Benoderam Sen, constituted a joint and undivided Hindu family, and alleging that the properties so purchased formed part of the joint estate of that family, brought the suit out of which this appeal has arisen, in order to recover both estates, minus the assumed shares of Benoderam, Ramsoonder, and Ramchunder therein; and the first question for the Lordships' determination is, whether there are sufficient grounds for disturbing the conclusion to which both the Indian Courts have come, *viz.*, that the properties in dispute were part of the joint family estate.

It is not disputed that Ramsoonder was a member of a joint and undivided family. The status, however, of the family is peculiar. Mr. Justice Loch says (and neither does he question the accuracy of the description):—"The evidence of the appellants and of those members of the family who have been examined clearly shows that, though the family were for particular seasons of the year lived together in a dwelling-house at Koredha, they also had separate funds of their own. The facts thus proved render it impossible for us to look upon the family as a Hindu family in the ordinary sense."

family having all things in common, all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family." Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family; and to throw upon those who claim as joint property that of which they have allowed their coparcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the respondents, the plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favor. The two Courts have, however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon weaker grounds than that of the Principal Sudder Ameen.

The following are undisputed facts concerning the two parts of Shahjehanpore, or at least that portion of it which was the subject-matter in this suit, was the zemindari of one Raja Ramsoonder Sing. At various dates before 1859 he had granted parts of the land, and several ijaras of other parts, of this land in the name of Ramsoonder, and had assigned the rents of these ijaras, by way of security for certain advances made to him by other members of Ramsoonder's family. In July 1859, the zemindari, which has been the subject-matter of other creditors, was put up for sale, and was purchased by Ramsoonder as the highest bidder. He was put into possession of it, and from that time to his death, his name stood in the Collector's office as the registered proprietor. It has been contended that there is no question in this suit touching the interests acquired in the name of

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Ramsoonder before this execution sale. The only question is, whether the zemindari interest, which was then sold, became, by virtue of that sale, the separate property of Ramsoonder, or part of the joint property of the family.

Of Cossipore, a four annas share belonged to one Kissoreemonee Dossee, the remaining twelve annas standing in the name of Shibram Dey, who has been called as a witness in the cause. In 1855 the four annas share was purchased in the sole name of Ramsoonder Sen, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book. In April 1856, the interest of Shibram Dey was, on the suggestion that it had been purchased by Ramsoonder, also transferred into his name, and he was thenceforward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoonder died in December 1862, pending the suit in which the execution, which is the foundation of the appellants' title, issued, but before judgment had been recovered therein. He left as his heirs two infant sons, and, on the 15th of January 1863, his brother, Ramchunder, obtained a certificate of administration under Acts XL of 1858 and XXVII of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, Ramchunder had stated that his brother's property in debts, zemindari, trade, and Company's paper, was worth about Rs. 50,000. On the same 15th of January, Benoderam Sen, the eldest son and manager of the joint family, presented two petitions to the Collector of Zilla Moorshedabad, praying in the one that Cossipore, in the other that Shahjehanpore, be sold, and that the proceeds be paid into his name, on the allegation that the Cossipore estate had been purchased by him in the name of Ramsoonder, and that he was the true owner thereof. In February 1863, Ramchunder, as manager of Ramsoonder's estate, admitted the title of Benoderam, and, in March 1863, orders were made that the name of Benoderam be recorded instead of that of Ramsoonder in the records of both estates.

In June 1863, judgment was recovered in favour of the appellants.

Ramsoonder in the suit of Inderchunder Doogur, and both estates were afterwards attached as part of the property of the judgment-debtor. It follows, from what has been just stated, that both, when so attached, stood in the name of Benoderam.

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Thereupon Benoderam came in to set aside the attachments. His claims were dealt with separately according to the provisions of the 246th section of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate, and, as such, entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th of September 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd of September, and the execution sale took place on the 21st of November 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the appellants, which applies only to Shahjehanpore. The appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of Ramsoonder to his estate as his separate property must prevail, by reason of his having purchased it at an execution sale held after Act 15 of 1859 (the Code of Civil Procedure) had come into operation, and by force of the 260th section of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of any person, not the certified purchaser, though by agreement of the certified purchaser was used, shall be dismissed." Their Lordships will not inquire whether there is any proof that Ramsoonder, who purchased at an execution sale a few days after the Act came into operation, was acting under the Act, or of its terms, if he did so, assuming him to have been the certified purchaser. In the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as this, which is designed to check the practice of making purchases as *benami* purchases at execution

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sales,—*i.e.*, transactions in which A secretly purchases on his own account, in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase-money of the property in question was derived,—*i.e.*, whether it came from the common family chest at Koredha in Beerbhoom, or from the separate funds of Ramsunder employed by him in carrying on his business, admitted to be separate, at Khagra, near Moorshedabad. The evidence adduced by the respondents in support of their claim consisted mainly of a large body of oral testimony; of certain books and accounts kept at the family-house at Koredha, being part of the joint family accounts; of the separate books and accounts of Ramsunder kept at Khagra; and of letters purporting to be letters which had passed between him and Ramkrishna, the son of Benoderam, being together at Khagra, on the one hand, and Benoderam residing at Koredha on the other. The Principal Sudder Ameen treating the whole of this evidence, whether oral or documentary, as trustworthy, came to the conclusion that the plaintiffs had established their case. The Judges of the High Court appear to have considered that the evidence which the Principal Sudder Ameen had relied upon was inadmissible in evidence against the defendants, and that they had found reasons for discrediting the accounts. They held that, nevertheless, the finding of the Principal Sudder Ameen was capable of being supported upon the oral testimony, and that the light cast upon it by the conduct of the defendants.

If it were clear that the Judges of the High Court were wrong in rejecting the letters, and in treating the evidence as unworthy, the correctness of their findings would be determined by the sufficiency of the evidence which they have rested it. Even in that case

unable to adopt the inference which the learned Judges have drawn from the conduct of Ramchunder and Benoderam, or altogether to concur in other parts of their reasoning, would have felt great difficulty in disturbing their finding, inasmuch as both Courts are agreed as to the credibility of the plaintiffs' witnesses. Their Lordships, however, are of opinion that the letters, if proved as the Principal Sudder Ameen has found them to have been, were clearly admissible in evidence against the appellants who claim under Ramchunder.

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It was said that the Judges of the High Court have treated these letters as not duly proved. But it appears to their Lordships that those learned Judges, thinking that the documents would not, if proved, be admissible against the appellants, never addressed their minds to the sufficiency of the proof. The judgment on that point of the Principal Sudder Ameen, a native Judge, dealing with letters in the native character, and purporting to have passed between Natives, is, in their Lordships' opinion, of very great weight. The letters, moreover, afford internal evidence that they have not been concocted for the purposes of this suit. And since those with which Ramchunder has been directly connected, by proof of handwriting otherwise, clearly show that he and Ramkristo were acting jointly on behalf of the family in the purchase of Shahjehanabad, the letters of Ramkristo written in the course of the same transaction seem to be also admissible; and the whole evidence affords the strongest confirmation of the statement made by the plaintiffs' witnesses.

Their Lordships are not satisfied that the objection urged by the Judges of the High Court to the accounts of the Principal Sudder Ameen (possibly a more competent judge of account than any European can be) gave rise to any question is no doubt to be taken between those family accounts, taken by themselves, are corroborative evidence. But the private account, produced by his brother from the Principal Sudder Ameen, genuine, be direct evidence, in the balance of his part against the appellants.

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There are entries in the latter which strongly support the plaintiffs' title. And these are not open to some of the objections taken by the High Court to the family accounts; particularly to one which their Lordships may observe they do not consider to be by any means conclusive, *viz.*, one to the effect that the last mentioned accounts, or some of them, were produced by Benoderam in support of his claims to the sole ownership of the estates. Ramsunder's grant to Surusuttee Dabee also affords some corroboration of the plaintiffs' case as to Shahjehanpore.

Regarding Cossipore, it may be observed that although much of the plaintiffs' documentary evidence, and in particular the letters, have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family property is stronger than that relating to Shahjehanpore. Shibrām Dey, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve annas share in this estate, which once stood in his name, was purchased in his name with the family funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of Ramsunder. The High Court has found that, before this *benami* purchase, the family was interested as *patnidars* in this estate; and every probability is, therefore, in favor of the conclusion that the evidence given to prove that the purchase of the other for share in the estate was also a family transaction, is true.

Their Lordships are of opinion that the evidence on the part of the plaintiffs is too strong to be outweighed by the inferences to be drawn from the conduct of Ramsunder in the matter of the claims advanced, or from the conduct of the family in allowing Ramsunder on the occasion of giving security to the Collector, that these properties belonged to himself without objection. Their Lordships will afterwards consider how far the evidence involved in these last-mentioned transactions supports the right of the plaintiffs to succeed in their claim. In ing whether, in point of fact, the properties claimed by them can only be treated as in the nature of a joint family

sistent with the title now asserted; and, viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the plaintiffs.

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On the whole, then, their Lordships, after full consideration of the arguments for the appellants, and notwithstanding the omission to call or account for Ramkristo, have come to the conclusion that the finding of the two Indian Courts, to the effect that both estates were purchased with joint family funds, and became joint family property, ought to be affirmed.

If this be so, the next question to be considered is, whether the plaintiffs have forfeited their right to assert their title against the appellants by reason of their own conduct, or the acts of any of those with whom they are connected?

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that Ramsoonder, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It is an unfortunate consequence of the Hindu law touching joint and separate property of members of an undivided family that it is one of which all who deal with a Hindu trader run their chance. Nor can greater effect be given to the misrepresentation made by Ramsoonder, probably with the connivance of the adult members of his family, when he gave a false statement to the Collector. Such a misrepresentation might be used as an estoppel against the family, had it not been for the respect of the security arisen between them and the appellants, which it has no bearing upon the present suit. In the present case, in which light it has been already considered, of tortuous dealing, which affects the plaintiffs. It was not upon the faith of the statement of the appellant purchased.

Where, of the defence is to be found, if

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anywhere, in the acts done after Ramsouder's death, and before the sale.

The first of these was the transfer of the estates into the sole name of Benoderam, on his application, and with the consent of Ramchunder. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between Benoderam and Ramsouder, at least, to put the estates beyond the reach of Ramsouder's creditors, and therefore fraudulent as against those creditors. They do not impute to Benoderam or to Ramchunder any intention to defraud either the children of Ramsouder or any other member of the joint family. But Ramsouder was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them not as family property in which he would have a seisable interest but as the property of Benoderam alone. In furtherance of this scheme, Benoderam, when the estates were attached, filed his claims. If those claims had been successful, the attachments would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to truth, on the ground that the estates were joint family property, the execution must have gone on, though with notice to Benoderam that such a claim had been made. The dismissal of Benoderam's claims became final by his failure to bring them on for trial within the time specified in the orders. But the orders themselves do not state any grounds of dismissal; and though they negatively affirm that the estates were not joint family property, by Benoderam, they in no way affirm that Ramsouder was sole owner of the properties. And the deposition of the witnesses from page 412 to 416 of the report does not clearly show that the case made by the decree against Benoderam's claim to Shahjehanpore was that it was family property in which Ramsouder was a coparcener, than that it belonged to him. How then do these proceedings affect the claim of Ramsouder's creditors?

iffs to assert against the appellants the title to the estates which they have been shown to possess? They might be estopped, if it were shown that they had represented Ramsoonder to be the sole owner of the estates; and that the appellants had purchased on the faith of that representation. But it is impossible from the proceedings in question to extract any such misrepresentation; even if the plaintiffs on the record are to be held to be bound by every act and statement of Benoderam.

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Again, is their right affected because, when Benoderam put forward a false claim, they did not formally prefer the true one? There is nothing in the Code of Procedure which made it imperative on them to do this; the claim, if made, could not have stopped the execution sale altogether.

The highest ground on which the appellants can put their case is, that Benoderam misled them by his fraudulent attempt to defeat the execution; and that the whole family is bound by his acts. It is not necessary to decide how far Benoderam and Ramchunder, who are not parties to this suit, might be affected individually by these proceedings, if they were suing to recover their respective shares. On the present record it must be held that their shares have passed to, and are now vested in, the appellants. Their Lordships have felt some doubt whether the appellants, suing as members of a Hindu family, still joint and undivided, for property which, if recovered, will presumably fall into the common stock of that family, might be shown to be bound by the acts of Benoderam of omission or commission, and responsible for the consequences of them. But they are of opinion that a defence, founded on such a joint responsibility, should be pleaded and proved than it has been in this case. The plaintiffs on the record have been parties misled in law by Benoderam's proceedings, if at all, the appellants were misled by the questions which have never been fairly put before the courts below. This was so found, and as it was directly found, by the Principal Sudder

Therefore, of opinion that the second

1878 point taken by the learned Counsel for the appellant is no
 BODH SING answer to the suit, and they must humbly advise Her Majesty
 DOODHOORIA to affirm the decrees under appeal, and to dismiss this appeal
 v. to affirm the decrees under appeal, and to dismiss this appeal
 GUNESH with costs (1).
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Appeal dismissed.

Agents for appellants: Messrs. *James and John Hopgood.*

Agents for respondents: Messrs. *Barrow and Barton.*

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

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 May 14.

BHOLANATH MAHTA AND ANOTHER (PLAINTIFFS) v. AJOODHIA
 PERSAD SOOKUL AND OTHERS (DEFENDANTS).*

Hindu Law—Separate Acquisition—Presumption—Joint Family.

The presumption of Hindu law that any property acquired during the life of a Hindu family remains joint belongs to all the members of the joint family. It does not take away the onus which lies on the plaintiff in a suit to recover his share of the property of proving his case; it merely aids him in proving his case. Such presumption is liable to be rebutted by means other than proof of purchase. As to the source from which the purchase-money of the property was derived. That criterion, though the most satisfactory, is not indispensable.

Evidence that the property claimed to be joint was purchased by one member only, that after the purchase the members separately carried on business, that one member carried on business separately, and that the property was put forward in the exclusive possession, and used for the private use of one member in whose name it had been purchased, is evidence which rebutts the presumption that the property was joint.

THIS was a suit, brought by Bholanath Lall Mahta, against Ajoodhia Persad Sookul

* Regular Appeal, No. 191 of 1871, from a decree of the District Court of Tirhoot, dated the 15th March 1872.

(1) See next page.

in the plaint as defendants first party, Shewrunlall Mahta and others, described as defendants second party, and Thakoor Persad Mahta, described as defendant third party, for recovery of possession of two-thirds of an eight-anna share out of the entire sixteen annas share of a saltpetre godown in Mauza Mittonpore, Pergunna Bisara. The plaint stated that Sheeb Newaz Mahta, father of the defendants second party, and Brijlall Mahta, father of the plaintiffs and of the defendant third party, were two uterine brothers, living in commensality; that after the deaths of the plaintiffs' father and the father of the defendants second party, the plaintiffs and the defendants, second and third party, all along lived in commensality and in one and the same house as before; that the disputed property, as also other properties, moveable and immoveable, continued to be acquired while the family remained joint; that, accordingly, each of them held the saltpetre godown and houses situate in Kusba Mozufferpore and Mahadeo Dutt, and mauzas, villages, gardens, &c., and appropriated the proceeds thereof jointly; and therefore, out of the joint property acquired in a state of coparcenary, eight annas are the share of the heirs of Sheeb Newaz Mahta, and the other eight annas are the share of the heirs of Brijlall Mahta; that each of them all along continued in possession of his respective share; that, notwithstanding this, the defendants first party forcibly and illegally ousted the plaintiffs, on the 18th February 1871, from the property in dispute, which had been sold by auction, on account of the debt of Shewrunlall Mahta, in execution of a decree of the Court of the District Judge at Tirhoot, on the ground of auction-purchase of the property of the said Shewrunlall Mahta, one of the sons of Sheeb Newaz Mahta; and that the right of the plaintiffs to the property for the debt of Shewrunlall.

It was, that the property in dispute was the property of Shewrunlall; that the plaintiffs had possession thereof; and that the purchase by the defendants was made in good faith.

The District Judge of Tirhoot raised, *inter alia*, the question, "Does the property belong to Shewrunlall alone, or does it belong to the plaintiffs?"

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The Judge held that it was absolutely necessary for the plaintiffs to prove their right and title to the property; that, of the five witnesses, who had been cited by the plaintiffs, two only, by name Teluck Tewary and Sobah Roy, deposed from their personal knowledge that the godown was *ijmali*; that Sobah Roy was a *piada* in the plaintiffs' employ on Rs. 3 per mensem, and his statement alone, unsupported by proof, was insufficient; that the evidence of Teluck Tewary was full of discrepancies, and therefore untrustworthy; that the evidence of the other witnesses was merely hearsay; that the evidence of the plaintiffs was unsupported by reliable evidence; that if the plaintiffs' statement had been true, they could have produced the account-books, shewing the sales, purchases, loans, and other general transactions, and witnesses connected with them might have been called; that the evidence of the defendants clearly proved that the godown was not the property of the plaintiffs, but of the defendant Shewrunlall; that the *kabala* under which the godown was purchased was in the name of Shewrunlall, and the evidence of Munshi Seetaram showed that he sold the property to Shewrunlall alone, and that from him alone he had received the purchase-money, neither of the brothers having purchased with him jointly; and that the evidence of Mohunt Maharaj Geer, the *malik* of the land, and a man of respectability, proved that the land was settled with Shewrunlall alone. The Judge also found that the bond, whereby the property was mortgaged to Lingham, was attested by the two brothers, Sew Sahoy and Thakoor Persad. He considered it to be proved that the godown in dispute was the property of Shewrunlall, and accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

Baboo Hem Chunder Banerjee, for the appellants, submitted that the family was admitted to be a joint family, and that the property in dispute was acquired. The presumption in this state of things is, that property so acquired is, therefore, on the defendants' side. He submitted that it is the duty of the appellants to prove that it is the separate property of the defendant Shewrunlall—

Jodheshur Chunder Koondoo (1). The plaintiffs are not bound even to prove that there was any nucleus with which the property could be purchased. The normal state of every Hindu family is joint, and the presumption always is, that whatever property is acquired during a state of coparcenary, is property in which all the members of the joint family have a right—*Neelkisto Deb Burmono v. Beer Chunder Thakoor* (2). To rebut this presumption the defendants must prove the source from which the purchase-money came—*Koonj Beharee Dutt v. Khettturnath Dutt* (3). There is no evidence to show that Shewrunlall bought the godown with his own money.

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Baboos *Doorgamohun Doss* and *Boodh Sen Singh*, for the respondents, were not called upon.

The following judgments were delivered :—

PHEAR, J., (after shortly stating the facts continued):—

The essence of this claim obviously lies in the allegation that the property, which is the subject of suit, was joint family property belonging to the plaintiffs and to the execution-debtor of Lingham, together with others; and that so far at any rate as regards the share of the plaintiffs in it, it has been alienated without authority.

The argument of this case very great stress indeed has been laid upon the doctrine of presumption in favor of the claim: the argument was even stretched so far as to maintain, namely, that it was not necessary for the plaintiffs to prove any facts in order to launch their case. It was contended that the property was the joint property of the plaintiffs and other persons living together as a joint family, and it consequently lay upon the defendants to prove that the property was not in this predicament.

But, as to the evidence which is on the record, it is the joint property of the plaintiffs and of the defendant. I direct my attention to some of the

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authorities which have been quoted in support of the position which the plaintiffs' pleader thus took up. There has been, no doubt, some conflict of opinion in this Court as to the mode in which, or the extent to which, the doctrine of Hindu law, relative to the presumption to be made in regard to Hindu property, is to be applied.

One of the cases in which the doctrine in question was applied is *Shiu Golam Sing v. Baran Sing* (1), and some importance was, yesterday, in course of the argument before us, attached to the fact that a Division Bench of this Court has lately pronounced the decision, which was passed by the earlier Division Bench in that case, to be erroneous in law. A report of the latter case, *Taruck Chunder Poddar v. Jodeshur Chunder Koondoo* (2), was referred to in order to show this. In the report this passage occurs:—"There is one more case which I must notice that is directly opposed to the decision of the Privy Council—*Shiu Golam Sing v. Baran Sing* (1). With every respect for the learned Judges who pronounced that decision, I feel obliged by the superior authority of the Privy Council to differ from it. The law laid down by the Judicial Committee in the case in 12 Moore's Indian Appeals (3) does not appear to have been presented to the learned Judges. Probably if it had been, they would, whatever their own opinion might have been on the subject, have considered that they were bound to follow it."

It is I think, for many reasons, somewhat unfortunate that the Division Bench of this Court should have found it necessary to express its opinion with regard to the decision of the earlier Division Bench, so strongly as to amount to a declaration that the decision was wrong in law. One reason is that such a statement must necessarily have the effect of creating a doubt in the minds of those who were affected by the former decision as to the determination of the matter which then arose, and at the same time the second Division

(1) 1 B. L. R., A. C., 164.

(2) 11 B. L. R., 193.

(3) There is a note by the Chief

the original

the words

should

Justice to this passage in the margin of

ity to disturb the decision of the first; neither is its opinion as to the propriety of that decision necessarily better than that of the Bench which passed it. And as it is not generally expedient, so also it is not usual, and I must say also with the greatest deference for the learned Judges who delivered the later judgment, that I cannot see that it was necessary in this particular instance for a Division Bench to make a statement going quite so far as that of which I am speaking. I feel myself bound very reluctantly to comment, to the small extent which I propose to comment, upon this passage, because it fell to me to express the opinion of the Division Bench, which was passed in the earlier of the two cases. It may be that, in the words which I then used, there is an unnecessarily broad statement of that which the law required the plaintiff under the circumstances of that particular case to establish before he could succeed in his suit—a statement which may possibly be in some of its particulars erroneous, though I do not feel myself called upon at present even to consider whether it was so or not; but however this may be, it is now I think incumbent on me as duty to the parties concerned in that case to say that, having fully reconsidered that decision with the light which the judgment in the case of *Taruck Chunder Poddar v. Jodeshur Chunder* (1) may have thrown upon the matter, I am still of opinion that the original decision was a perfectly correct decision in law. That, on the solitary fact which was before the Court in resting solely on an admission made in the defendant's statement, it was impossible for this Court, on to do otherwise than declare that the decision of the coordinate Judge had come to was a perfectly good case. And it is not an immaterial error—an the copy of the judgment which is given of the Weekly Reporter—to suppose that the Bench in the first case had not before it the authorities. It was not possible that the Privy Council, which is reported in appeals, and to which so much weight

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has been attributed by the later Division Bench, or that the law which is supposed to have been laid down thereby, could have been presented to the former Division Bench, for the simple reason that the judgment of the Privy Council was not delivered until 1869, whereas the decision of the Division Bench which is in question was passed in 1868. And, further, it did certainly happen to be the fact that the view of the law which is expressed in 12 Moore's Indian Appeals, p. 540, was precisely the view which the Judges of the Division Bench took, and by which they intended to be guided. This, I think, is quite manifest on the face of the judgment itself. It is perhaps superfluous to add that the enunciation of the law in 12 Moore's Indian Appeals, p. 540, which has been made so much of, is not, in any degree, a new statement of the law. Indeed, it can hardly be said with correctness that any law was there laid down. The words of the Privy Council, as reported, are:—"The normal state of every Hindu family is joint, presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."

In these words, obviously a simple reference was made to that which was generally acknowledged to be the state of the law, merely for the purpose of going on, as the Privy Council presently does go on, to show that in that particular instance which they were then dealing the rule of presumption applied; not for the purpose of pointing out how it was applied.

I cannot help thinking that, in many of the cases in which this particular rule of presumption has been applied, of great importance, it has been forgotten that the object of the law directing that a disputable presumption of jointness should be made, is simply to supply the place of evidence which is otherwise wanting in the case. And obviously every presumption of this nature must have a foundation of fact. I understand, because certain facts are shown, that an additional fact is presumed in the absence of any other evidence for or against it.

for presuming it in the case of a disputable presumption generally is, that if the proved fact exist, the existence of the presumed fact accords better with ordinary experience of the actual state of things than its non-existence. The presumption in truth is simply made because it is considered to afford a safe rule for the ascertainment of a fact without other evidence of it from a set of facts which are proved. So that the rule of presumption, of which we are speaking, cannot alter the onus which lies on a plaintiff to make out his case; it only aids him in proving it. With the help of the rule, if it is applicable, he must make out all the facts necessary to his cause of action, just as the plaintiff must do in any other case.

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Now, here, what is the set of facts which are in any degree proved on the side of the plaintiff; at most it is this: that the plaintiff and the defendants 2, 3, 4, 5 and 7 were members of a joint family; that this family had certain property; that amongst other properties the godown, which is the subject of the suit, was one item, but that it was not ancestral property; that this item of property was bought in the name Shewrunlall while the family was joint; that, after this event, the family separated, and each of its members carried on his business separately; that the business which Shewrunlall carried on was saltpetre business, and this godown was used by him solely in his saltpetre business.

the case presented on the side of the plaintiffs. It is not then if the plaintiffs cannot succeed in this case without any facts at all, as it was at first contended that the facts are at any rate sufficient for them.

It is useful here to read a passage from a judgment of the Privy Council (1), to which I referred yesterday, and which was then at hand for the purpose of quoting. The judgment was delivered on the 10th of the Privy Council judgments which were referred to this Court. The question in that case was as to the right, title, and interest of the plaintiff. The passage which I desire to read

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is this:—"It is not disputed that Ramsouder was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice Loch says (and neither party has disputed the accuracy of the description):—"The evidence of the witnesses, and of those members of the family who have been examined, clearly shows that, though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindu family in the ordinary sense of the term,—that is, as a family having all things in common, all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to the other members of the family." The Privy Council go on to say:—"Such a state of things may, in their Lordships' judgment, fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of a member of a joint family; and to throw upon those claiming it as joint property that of which they have all the incidents of coparcener, trading and incurring liabilities on their own account, to appear to be the sole owner, they must establish their title by clear and cogent evidence." It is quite clear then that the Privy Council, in the cases I have just cited, were of opinion that the presumption which has in the present case been appealed against, is not by the circumstances even of the case warranted in favour of the plaintiff.

To some extent it is apparent that the facts of the case to which their Lordships' observations are applied, and the material particulars, resemble the facts of the present case. It appears to me then that, taking the facts into consideration on the record, the presumption

make in their favor, is, to use the language of the Privy Council, very much weakened indeed, if it is not absolutely rebutted by their own facts.

Then, on turning to the side of the defendants, I find their evidence which makes it clear beyond all doubt in my mind that the property which is the subject of the suit was acquired by Shewrunlall by purchase in 1862, probably no doubt at a time when, according to the plaintiffs' facts of the case, the family was joint; but that it was bought and paid for by Shewrunlall, apparently, so far as the vendor could perceive, for his own purposes; that it was used by him alone personally from that time forwards; that he paid rent for it to a Gossain, or head of a certain religious establishment, which had a right to receive the rent or part of the rent, until the time when the final alienation which is complained of took place in February 1871. In the meanwhile, namely, in May 1868, the property had been mortgaged by Shewrunlall to Mr. Lingham, in order to secure a debt of his own; and somewhere about 1865 or 1866, before this mortgage was effected (at a rate according to the plaintiffs' own witnesses) the separation of the family, which I have already mentioned, took place. I then find this property, notwithstanding these facts, still in the hands of Shewrunlall, used by him for the purposes of his separate business, and sold in execution of the decree which Mr. Lingham got over it, and in this manner it came to the principal defendant.

I am now to say that, upon this evidence, I am perfectly satisfied that the property in question is not tainted with fraud from that which occurred after the period of the joint family, as well as from that which occurred before. The property was Shewrunlall's own separate property, and the plaintiffs had no share whatever in it. If it were said to us during the argument, that all these facts were against the presumption which the Hindu law is to make, I feel bound to say that this presumption, if I understand the law, entirely erroneous. It is in my mind to maintain that the evidence which has, for its purpose, the ascertainment of the facts, should be allowed to override the presumption negating the existence of that fact.

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It has been pressed upon us that the only mode of rebutting this presumption, which is allowed by law, is to enquire where the purchase-money came from, and to be guided solely by the result. If this be so, the defendant in a case of this kind is, by the law, gratuitously confronted with a difficulty which is in most cases almost insuperable. No doubt, whenever such an enquiry can be pushed, and a satisfactory answer to it arrived at, it does offer the best possible means of ascertaining the actual state of relevant facts. But I altogether dissent from the argument which has been pressed upon us, to the effect that no other course can in law be pursued for the purpose of meeting the presumption. Two or three judgments, one of them certainly of the Privy Council, were, no doubt, referred to in support of this argument. But it seems to me, without going back to the words which were actually used in those judgments, that this particular mode was in no case laid down as the *only* mode in which the presumption could be met; it was simply spoken of as being a very useful and a very satisfactory mode whenever it could be effectively pursued. In the very last case, which I have already referred to, of the Privy Council's judgments, their Lordships say:—"It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase-money of the property in question was derived,—i.e., whether it came from the common family chest at Koredha in Beerbhoom, or from the separate funds of Ramsunder employed by him in carrying on his business, admitted to be separate, at Moorshedabad (1)." A good deal of evidence was given both affirmative or negative of that fact seems to have been given by both sides. Therefore, as there was such evidence given, and available in that case, no doubt it was the only mode probably the only proper mode of meeting the presumption. And probably, also, whenever the disputing parties were of the same family, evidence upon this point was to be expected. But when, as in the present case, the defendant is a stranger to the family, and his vendor is a stranger to the family, it is absolutely beyond reach of the plaintiffs,

defendant so situated should give evidence as to whence the original purchase-money came; and to the best of my judgment no decision which we are bound to follow lays down that this criterion is indispensable.

It appears to me then, on the whole, that we ought to find no difficulty whatever in determining this suit upon the evidence which has been laid before us. I am satisfied, for the reasons which I have indicated, that the judgment of the lower Court is quite correct, and therefore I would dismiss the appeal with costs.

AINSLIE, J.—It appears to me that, on the evidence in this case, the plaintiffs have not succeeded in establishing that this property was ever enjoyed by them as part of the joint family property. In 1862, when this property was acquired, the family, no doubt, was a joint undivided family, and it may be of course that Shewrunlall, who conducted the business of the godown, was conducting it as manager for the whole family. On the evidence I think it is quite clear that nobody but Shewrunlall has ever taken any part in the conduct of the business, paying the rent, or doing any other act which may be evidence of partnership. Then, about the year 1866, there was a separation of the family, and after that separation Shewrunlall was put in sole charge, occupation, and enjoyment of the property, and in 1868 he entered into that transaction which has been proved. If after the separation, Shewrunlall is to be considered the manager of the family as before, it seems to me that the plaintiff was bound to give evidence of the arrangements made as to the property that was entered into at the time of the separation; and that, in the absence of that evidence, the court should find that the property was done for the period up to 1866, we should find that Shewrunlall any longer represented any

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evidence as to the condition on which the property was held, and what property they had at the date of the separation, and how it was held afterwards. In this state of facts, we ought to hold that the property, at the time of the separation, has undoubt-

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edly been occupying this property as his own; and having found this fact, I think that we are not only at liberty, but we are obliged, to apply it to the issue which was raised, namely, whether, at the time of the acquisition of the property, it was acquired for the whole family or for Shewrunlall separately. The appellant relies upon a presumption of law, that all property held by any member of a joint family during the time the family is joint, is the property of the joint family. But that presumption is one which is capable of being rebutted: and it seems to me that this unexplained fact, that the whole of this property after separation came into the hands of Shewrunlall alone, is evidence sufficient to rebut that presumption.

With reference to the case that was cited from the 8 Weekly Reporter (1), which was said to have laid down as a rule that it was absolutely necessary to prove the source of the purchase-money, I would observe that where it is possible, and where there is evidence on that point, it is no doubt a most important fact. If in any case it can be determined in at all a satisfactory manner, it would probably be conclusive. But where no evidence whatever is given on that point, I do not think that the Court is bound to reject other evidence which may bear upon the merits of the case. If this were done, most serious injustice might be pointed out by my learned colleague, be done in almost every case where the parties, who can furnish the necessary evidence to prove the source of the purchase-money, have a strong motive for combining to withhold it. I concur in dismissing this appeal.

App.

(1) *Koonj Beharee Dutt v. Khellurnath Dutt*, 8 V. 100.
Tarachurn Mookerjee v. Joy Narain Mookerjee Id., 9 V. 100.

(2) See next case.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

DENONATH SHAW v. HURRYNARAIN SHAW AND OTHERS.

1873
April 4 & 17.

*Hindu Law—Joint Family—Limitation—Separate Acquisition—Nucleus—
Onus—Act XIV of 1859, s. 1, cl. 13.*

A claim by a member of a joint Hindu family to a share in a family dwelling, on the allegation that the house was originally joint, falls within the provisions of s. 1, cl. 13 of Act XIV of 1859 (1).

Semle.—When property has been purchased by an individual member of a joint Hindu family, the burden of proof is on those who claim it to be joint property to show that there was a nucleus of joint property out of which it could have been purchased.

THIS suit was brought to obtain possession of a one-third share of a dwelling-house, which the plaintiff alleged to be joint family property, originally purchased in the name of his father and of which no separation had since been affected.

Anundoram Shaw, a Hindu, died about the year 1802, leaving of certain immoveable property, purchased by him, in the sum of Rs. 1000 and leaving four sons, Rammohun, Ramdhone, Ramnath, and Ramnidhi, his heirs, and also his second wife Sree-
devi, who was then surviving. After his death his four sons obtained possession of the property left by their father. Rammohun (but whether before or after the death of Anundoram was no evidence to show) purchased 8 katas of land of the property purchased by Anundoram, and the plaintiff claimed a share. The plaintiff alleged that the family dwelling-house was situated on the land of which he claimed a share. The plaintiff alleged that the defendants were the sons of

that to protect the property from his

of 1871, Sched. ii, No. 127.

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creditors, Ramdhone, being in embarrassed circumstances, had conveyed the property in suit and the dwelling-house to his father *benami* for himself and his brothers, but that he continued to live in and occupy the house and premises with his brothers, as members of a joint Hindu family; that until the death of Rammohun (about sixty years ago), the four brothers, and after his death, the three survivors, continued to reside in and enjoy the family dwelling-house and premises as a joint Hindu family; that Ramrutton died about thirty-three years ago, and Ramnidhi about the year 1844; that after the death of Rammohun and Ramnidhi, the plaintiff remained joint in food, worship, and estate with his uncle Ramdhone, and continued to possess and enjoy the family dwelling-house, but about one year after the death of Ramdhone, the plaintiff separated himself in food and worship from the defendants, but remained joint in estate with them until the time of suit. He accordingly prayed for a partition of the dwelling-house and premises, and that a one-third share thereof should be allotted to him in severalty.

The plaint was filed on the 25th July 1872.

The defendants in their written statement denied that Annadoram Shaw had purchased the land alleged by the plaintiff to have been purchased by him, and alleged that Rammohun had from time to time purchased in his own name and out of his own funds the land on which he had erected the dwelling-house in suit; that the four brothers after the death of their father were separate in estate and food; that on 6th March 1854 Rammohun Shaw executed a mortgage of the family property in favor of two persons for securing the repayment of a loan, and gave a bond and warrant to confess judgment; that Rammohun Shaw and one Choitun Churn Shaw, who were largely indebted to Ramdhone Shaw and Bhuggobun Shaw, executed on or about the 7th April 1854 a deed of gift of their property, including the dwelling-house, to Ramdhone and Bhuggobun; and that the plaintiff eventually paid off the mortgage, bond, and warrant, and took possession of the title-deeds of the property; that after the death of Ramrutton, the plaintiff, with his mother, continued to dwell in the dwelling-house in which they had until the death of Ramrutton.

never came back to the house, or resided therein, or had any possession or enjoyment of, or claimed any share in, the same until the institution of this suit, but that the defendants had ever since Ramdhone Shaw's death been in possession of the house and of the title thereof. Under these circumstances the defendants contended that the land and premises in question were the separate property of Ramdhone Shaw, although he allowed his brothers Ramrutton and Ramnidhi to reside in the house. The defendants further contended that even if these premises had been purchased by Anundoram, the plaintiff's claim would be barred by Act XIV. of 1859, and that even if the plaintiff was entitled to a partition, it could only be on the terms of paying off the principal money, secured by the mortgage, bond, and warrant of 6th May 1818, with interest.

The material facts as appearing in the evidence are sufficiently stated in the judgment.

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Mr. *Lowe* for the plaintiff.

Mr. *Evans* and Mr. *Bonnerjee* for the defendants.

Lowe.—This property was purchased by a member of a Hindu family, and the presumption is that every such family has a common fund for food, worship, and estate until the contrary is shown. The burden of proving a separation is on the party making such claim. In this case the defendants.

To make this house joint property, the plaintiff must show that there was a joint source from which the money was raised for the purchase of the house—*Khilut* and *Donj Lall Dhur* (1). This he has not done. *Rammohun* lived in commensality and the members of his family affords no presumption from which the purchase-money of this house can be inferred. *Bunder Kurmohar v. Rughoonath Kur-*

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mokar (1). The plaintiff's claim is barred by limitation ;
s. 1, cl. 13, Act XIV of 1859.

(1) *Before Mr. Justice Phear and
Justice Sir C. P. Hobhouse, Bart.*

The 28th August 1868.

KRISTO CHUNDER KURMOKAR AND
OTHERS (PLAINTIFFS) v. RUGHOO-
NATH KURMOKAR AND OTHERS
(DEFENDANTS).*

*Hindu Law—Joint Family—Separate Acqui-
sition—Burden of Proof—Nucleus.*

THIS was a suit to declare the plaintiffs' right to, and to confirm them in, possession of a certain *howala*, and to set aside a summary order relating thereto passed by the Collector in the defendants' favor. The *howala* was purchased by the plaintiff's grandfather; but according to the defendants' statement, although bought in his name, was for the benefit of himself and his three brothers who formed a joint Hindu family at the time of the purchase. The defendants claimed as descendants of these three brothers. They relied on an admission made in certain thakbust proceedings by Muddun Mohun, father of one set of the plaintiffs to the effect, that he, two of the defendants, and certain other persons were in joint possession of a *howala*, but what *howala* did not appear. On the other hand the plaintiffs filed two *bandabast* papers from which it appeared that Muddun Mohun had been in possession of the *howala* in dispute.

On this evidence the Munsif decreed in the plaintiffs' favor; but on appeal the Principal Sudder Ameen dismissed the suit on the ground that it lay on the plaintiffs to show, and that they

had not shown, out of what funds their grandfather had purchased the *howala*. From this decision the plaintiffs appealed to the High Court.

Baboo Chunder Madhub Ghose and Ashootosh Chatterjee for the appellants.

Baboo Romesh Chunder Mitter and Nobo Kissen Mookerjee for the respondents.

The following judgments were delivered:—

THEAR, J. — I think that, on the judgment of the lower Appellate Court, the decree of that Court ought to have been given in favor of the plaintiffs. The Principal Sudder Ameen finds that the property was acquired in the name of the plaintiffs' grandfather. He also finds, indeed, as I understand, admitted by the other side, that there is possession (of four annas at least) on the part of the plaintiffs at the present time, excepting so far as it was affected by the decision in the Revenue case. There is also the finding in favor of the plaintiffs in the documents relating to the *howala* of Muddun Mohun, father of one set of the plaintiffs, was in possession of the *howala* at an early date. Against this, the defendants, on the other side, absolutely failed to show that

facie appeared in their favor, and their appeal was dismissed. That the plaintiffs either to the

* Special Appeal, No. 867, preferred on the 9th August 1868. Additional Principal Sudder Ameen of Zilla Dacca, dated the 28th August 1868, confirmed the decree of the Munsif of Naraingunge, dated the 28th August 1868.

Mr. *Lowe* in reply.

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PONTIFEX, J. (who, after shortly stating the facts, continued):—

With respect to the evidence of ownership, it is scanty on both sides, but it is to be remembered that the plaintiff had to prove his title. The plaintiff's case is that during the lifetime of the four brothers they were joint in estate, and were in the joint

the plaintiffs. The alleged admission of Muddun Mohun really amounts to nothing, it is a mere statement that his brothers were, jointly with himself, possessors of a certain *howala*, which he does not name or describe in any way, and which cannot otherwise than by conjecture be identified with the *howala* in dispute. The Principal Sudder Ameen considered that it lay upon the plaintiffs, not only to show that the property stood in the name of their grandfather, and to show a possession and enjoyment of the property on behalf of themselves and their predecessors, but further to show that the property was acquired by their grandfather out of his own funds distinguished from the funds of the family. It seems to me that the Principal Sudder Ameen was right in this view. The plaintiffs' dependants are certainly not members of one joint family.

from the circumstance that the person in whose name the property was acquired was living jointly or in commensality with others. I have on other occasions explained what I conceived to be the two presumptions which are made with regard to the continuation of joint property and joint living, but I don't understand that any presumption arises by law against the plaintiff's title, merely on the ground of his having been at the time of the purchase a member of a joint family. Under the circumstances which the Principal Sudder Ameen has found to exist in this case, as I have already said, I think that the judgment of the lower Appellate Court ought to have lead to a decree in favor of the plaintiffs. Accordingly I would reverse the decision of the lower Appellate Court, and confirm the decision of the first Court, with costs both here and in the Court below.

HOBHOUSE, J.—I agree in the decision of Phear, J., that the decree should have been in favor of the appellant to this Court, mainly for the reasons that he has given, and my judgment is so far a stronger judgment than his that I hold that it was not the intention of the Court below to find that Modun Mohun Kurmokar was in possession under the *bando-basti* papers which are alluded to by the lower Court, still I think that for the reasons given the decree of the lower Court ought to be reversed.

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enjoyment of the property. The defendants do not dispute that the four brothers, and afterwards the three surviving, were joint in food and worship; they deny that the property was joint or purchased with joint funds. The plaintiff's father, Ramrutton, died some thirty-three years ago. Even during the lifetime of his father, the plaintiff had lived from time to time with his maternal uncle. Shortly after the death of his father, the plaintiff, his mother, and brothers were turned out of or left the house. The plaintiff has sworn that he has all along had possession of one room in this house, and that he from time to time went to live there, and that he had lived there in the aggregate for a period of three months in each year, although not all at once. He says he retains the key of the room, and that when he leaves the room, it is locked. Then he adds a circumstance as an illustration, namely, that the room still contains the toys of his childhood. If true, the statement that he occupies this room ought not to have been very difficult of proof. He might have called many persons to prove such occupation: but, in fact, all that the evidence comes to, is that the mother and brothers of the plaintiff, and the plaintiff himself were sometimes present at the house; but the times deposed were only when ceremonies were being performed, and relations would naturally attend.

(*The learned Judge, after examining the evidence as to the plaintiff's possession, proceeded as follows.*)—On the evidence I find that since Ramrutton's death, the plaintiff Denomath has not had possession of any room in the house, and he has not been there or occupied it; and if cl. 13 of the Limitation Act is applied to the case (as in my opinion it does), the plaintiff was barred by limitation. The language of the section is not very clear when applicable to a joint family house in respect of which no payments were made. I see *Gossain Dass Koondoo v. Siroo* [1874] 10 B.L.R. 100. If the section does not cover this case, the plaintiff's case was originally joint, it would continue to be joint if there was a separation. The question* then is whether the plaintiff has been barred by limitation.

(1) *Ante*, p. 353.

erty originally joint? In the absence of evidence as to the actual acquisition of the property, I should find considerable difficulty in coming to a decision on that question. There are numerous authorities in this Court which show that, when property is purchased in the name of an individual member of a joint family, the onus is upon the person claiming such property to be joint to show that there was a nucleus of joint property out of which it could have been purchased. There is however a late authority to the contrary; I refer to the case of *Taruck Chunder Poddar v. Jodeshur Chunder Koondoo* (1). In that case the Chief Justice carefully reviewed most of the earlier cases decided by this Court, and also the cases in the Privy Council up to the case of *Nilkrishna Deb Barman v. Bir Chandra Thakur* (2), and he held that, if a family is joint, and property is purchased by, or in the name of, one member, the onus is on that one member to show that it was purchased from separate funds. But the case decided by the Chief Justice does not notice the case of *Umritonath Chowdry v. Goureenath Chowdry* (3). That was an appeal from the unreported decision of Kemp and Pundit, JJ., who had held that in that case mere fact of commensality was not sufficient evidence of being joint in estate, and that it was necessary to ascertain whether the nucleus of the estate was originally joint or separate, though the Judicial Committee did not go strictly into the matter, they say at p. 550:—"Both these cases of family and jointness, the burden of which was entirely on the defendant, and that brings it back to the case which the plaintiffs have proved,—that is, the simple fact, that this was ancestral property of their common grandfather. That being so, and it being admitted that there was no other source from which acquisition could be made, the decree of the Court as to their Lordships to be right." If the Court had held that an estate, conveyed to an individual member, was joint, in the absence of proof to the contrary, it would be joint without any evidence of a nucleus of

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1, 13; S. C., 12 Moore's I. A., 523.

2, 542; S. C., 6 B. L. R., 232; see p. 242.

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joint property, then it is difficult to understand why the Judicial Committee should have relied on a substantial admission. I must confess that, if I had to give my opinion upon these conflicting authorities, as to whom the onus is to be on, I should be inclined to consider that, when property has been purchased by an individual member of a family, it is necessary for those who claim it as joint property to show that there was a nucleus of joint property out of which it could have been purchased. That position has been held by Mitter, J., in *Dhunookdharee Lall v. Gunput Lall* (1); by Phear, J., in *Shiu Golam Sing v. Baran Sing* (2); and by Jackson and Mitter, JJ., in *Radhika Prasad Dey v. Mussamut Dharma Dasi Debi* (3). Otherwise, it seems to me that it would be necessary to apply a double presumption, namely, first, that the family was joint; and secondly, that the family was possessed of property.

But, in fact, I do not think it necessary in this case to express any decided opinion on the question which is the subject of these conflicting decisions, because even if the onus were on the defendants to show that the property was the separately acquired property of Rammohun, I think the documentary evidence shows that the property purchased originally in his name was always dealt with as separate, and not as joint, property.

The property was purchased in three parcels in 1202 (1785), 1205 (1798), and 1206 (1799). All the deeds were in the name of Rammohun Shaw. On the 6th May 1818, Rammohun Shaw mortgaged the property to two persons to secure the payment of Rs. 1,601; and gave a bond and warrant to confer the same. On the 7th April 1820, Rammohun Shaw assigned the property in question by a deed of that date. The conveyance was made by Rammohun Shaw and Choitun Churn Sen. They appear to have been partners. They are described in the deed as Shaw as a wine merchant, and Choitun Churn Sen. as a merchant of Calcutta. There is a recital that the property had been given to them by Bhuggobun Shaw and Ramdhone Shaw, who had been given to them. The deed goes

(1) 11 B. L. R., 201.

(2) 1

(3) 3 B. L. R., A. C.

of collateral security, certain property and goods have been assigned to them with power to sell and dispose of the same. The schedule refers to a distillery in the garden, and to the house in question as belonging to Rammohun Shaw.

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It is now suggested that the deed is a mere *benami* transaction, and that the house was the joint property of the four brothers. If that was the case, and if it was necessary for Rammohun to sell, it would have been quite sufficient to have stated the facts. I am clearly of opinion from these deeds that Rammohun Shaw dealt with this property as his separate property, and that the deeds show that the property was not the joint property of the four brothers. I hold that the house was originally the separate property of Rammohun; that it was afterwards assigned to Ramdhone for valuable consideration, and that he has since held it as his separate property; and that up to Ramdhone's death, he permitted his brothers to reside there as a matter of hospitality, and that neither Ramrutton nor Ramnidhi had any claim or interest in the property.

Mr. Lowe has referred to the fact that certain witnesses were not called. The answer to that observation is that the plaintiff had to prove his case, and until he had proved his case, it was not sufficient to show from the deeds how the property was held. I am therefore of opinion that this suit should be dismissed with costs on scale 2.

Suit dismissed.

Plaintiff: Baboo *Promothonath Bose.*

Defendants: Baboo *Poorno Chunder Mookerjee.*

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

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Dec. 17.

SULTAN CHAND v. SMYTH.

*Minor—Indian Succession Act (X of 1865), ss. 2 & 3—Age of Majority—
Act XL of 1858.*

The definitions of "minor" and "minority" in the Indian Succession Act do not apply to cases in which a person enters into a contract on his own behalf, and not in any representative character under that Act.

CASE stated for the opinion of the High Court by the First Judge of the Calcutta Small Cause Court:—

"The plaintiff sued the defendant for Rs. 225 on a promissory note. The defendant pleaded minority. It was proved that the defendant at the time of the trial had passed twenty, but had not reached twenty-one years; that he was the legitimate son of a lady born in Ireland; that his father was a gentleman of Portuguese extraction domiciled in Calcutta; that his paternal grandfather was born in Portugal, had resided some years in Calcutta, and had returned to Lisbon, and had died there; and that the defendant was born, and had always lived in Calcutta. Under the evidence it was contended for the defendant that he was the legitimate son of a mother born in Ireland, he was a European British subject under the definition of 'European subject' contained in the Criminal Procedure Code, and was within the only exception to the rule of eighteen years of majority which was contained in Act XL of 1858. It had been ruled in *Archer v. Watkins* (1) that the rule applied to British subjects. The plaintiff, on the other hand, contended that the defendant had not been proved to be a British subject."

(1) 8 B. L. R., 30.

subject, inasmuch as the status of a defendant depended on his domicile, and a son's domicile was that of his father, and the defendant's father's domicile had been shown to be in Calcutta. The defendant, therefore, it was contended, came within the general rule in Act XL of 1858 and not within the exception, and being above eighteen years of age had reached his majority.

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"I held that as *Archer v. Watkins* (1) had been overruled by the Full Bench *In the matter of the Petition of Benod Behary Mullick* (2), where it was ruled that Act XL of 1858 had no application to residents in Calcutta, and the defendant and his father were both of them residents in Calcutta, the question whether the defendant was or was not a European British subject, was wholly immaterial to the case: that he had been proved not to be either a Mahomedan or Hindu; and that the English law was the law applicable to all persons domiciled in Calcutta, as the defendant had been shown to be, who did not belong to one or other of those two classes which are entitled to be governed by their own laws; and that the defendant must therefore be held to be a minor. I also held that the definitions of 'minor' and 'minority' contained in the Indian Succession Act (X of 1865) did not apply to cases of contract, but were confined, by the very section that contained them, to cases of intestate and testamentary succession; and on these grounds I gave judgment for the defendant. As, however, I had some doubts on my own mind whether it was possible to distinguish so clearly between cases of contract and cases of intestate and testamentary succession, as to apply to one of these classes of persons domiciled in Calcutta, the law of England as to persons above ten years of age, and to the other the law of India as to persons below one year, I made my judgment contingent upon the decision of the High Court upon the question—

The High Court was right in holding that the definitions of 'minor' and 'minority,' though they do apply to persons domiciled in Calcutta as well as to all others in India, only so far as to cases of intestate and testamentary succession, and not

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“At the request of the plaintiff I also refer the following question which he considers of importance, though it is in my opinion entirely irrelevant to the real issue, *viz.* :

“Whether the son of a man, who is of Portuguese extraction having an Indian domicile, by his wife, who is a native of Ireland, is a European British subject?”

The parties were not represented by Counsel.

The opinion of the High Court was delivered by

COUCH, C.J.—We are of opinion that the definition in the Indian Succession Act of ‘minor’ and ‘minority’ does not apply in cases where a person enters into a contract on his own behalf, and not in any representative character under that Act. S. 2 of the Act shows what the law in it is to be applicable to, *viz.*, cases of intestate or testamentary succession.

As to the second question, it was not necessary that it should be determined by the Judge of the Small Cause Court, and the plaintiff ought not to have asked to have it referred to the Court.

The judgment must be for the defendant as it has been given by the Judge of the Small Cause Court. .

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice

MACKENZIE, LYALL, AND OTHERS v. SHIB CHUR

1874

Jan'y 20.

Goods sold and delivered, Action for—Principal and Agent's Act—Delivery by, and payment to, unau

The defendant, through a broker, purchased from to be paid for by cash on delivery, and before rem and his broker knew that the plaintiffs had a separ ments for goods of the description purchased broker knew that the delivery clerk, whose duty had no authority to do so without a special portion of the goods was paid for at the ca obtained from the delivery clerk in the usual goods, the broker, on behalf, but without the

the delivery clerk and obtained delivery from him of the goods without any order for delivery having been given by the plaintiffs. The plaintiffs, a year subsequently, discovered that the delivery clerk had embezzled the money so paid to him. *Held*, that they were entitled to recover the balance of the price of the goods from the defendant in an action for goods sold and delivered.

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CASE stated for the opinion of the High Court by the First Judge of the Calcutta Small Cause Court.

The case stated that the plaintiffs sued to recover Rs. 565 for balance due for goods sold and delivered; that the defendant alleged in defence that, on the 9th July 1872, he entered into a contract with the plaintiffs for the purchase of 300 cases of window glass, the contract stipulating that the price should be payable in cash on delivery and before removal; that, on the 9th July 1872, he paid to the plaintiffs Rs. 51 by way of earnest; that on the each date of delivery he had either himself paid the plaintiffs the price of goods delivered, or sent the same through his broker Bhoyrub Chunder Sen; and that he made the following payments, and received delivery of goods on the following dates in the manner following:—

				Rs. As. P.
July 1872	...	...	{ Paid by way of earnest ... }	51 0 0
August 1872	...	{ Received 28 cases of glass ... }	{ Paid through Bhoy- rub Chunder Sen }	200 0 0
September 1872	...	Received 49 cases ...	Paid through ditto ...	350 0 0
October 1872	...	Do. 42 cases ...	Ditto ditto ...	300 0 0
November 1872	...	Do. 45 cases ...	Ditto ditto ...	321 0 0
December 1872	...	Do. 134 cases ...	Paid through self ...	900 0 0

... proceeded to state that "of these payments, the ... having received the sums of Rs. 51, Rs. 321, ... the dates alleged by the defendant; they further ... received on the 27th March 1873 Rs. 200, and ... 1873 Rs. 100, on account of the defendant, ... Bath Sett; but it has not been proved who

... were stated to have been proved, viz. :—

... had dealings with the plaintiffs for the ... during that time he had always had ... and had never had credit from them;

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that, excepting the payments of Rs. 51 on the 9th July, and Rs. 900 on the 20th November, which were made by himself, the defendant had made the other payments through Bhoyrub Chunder Sen; that both the defendant and Bhoyrub Chunder Sen were aware that there is a separate cash office of the plaintiffs where payments for goods of the description sold to the defendant, and generally (with certain special exceptions) for all goods sold by the plaintiffs whereof delivery was required, are usually made, and that such of the above payments as are admitted by both sides to have been received by the plaintiffs were paid into that office, whereas the other payments were made by the said Bhoyrub Chunder Sen to one Madhub Chunder Sircar; that the said Madhub Chunder Sircar was a servant of the plaintiffs, and was in charge of the said goods sold to the defendant, and delivered the same to the defendant; and that, besides being in charge of plaintiffs' goods of the description sold to the defendant, he had the charge of cash sales of certain other petty commodities not of the description sold to the defendant, the price whereof he was admitted to be authorized to receive; that although the whole of the goods were delivered as far back as November 1872, no notice was taken by, or given to, the plaintiffs of the payment of the price thereof, except the aforesaid, until about three months ago, when Madhub Chunder Sircar was prosecuted for embezzlement by the plaintiffs; that all goods delivered by Madhub Chunder Sircar were in the godowns of the plaintiffs, used to be delivered under the order of the firm, and that Madhub Chunder Sircar had no authority to deliver any goods without the firm's order, and that this authority was known to the defendant's broker, Bhoyrub Chunder Sen, and that it was not proved that any payments made by the firm on Madhub Chunder Sircar for the goods for which the plaintiffs allege that they were not paid for.

"As regards the remaining boxes of wine, there is no dispute, owing to their breakage."

The first Judge of the Small Cause Court, in his judgment under the circumstances stated, the payments made by the defendant to Bhoyrub Chunder Sircar were not payments for goods, but were payments being known to the defendant's agent, Bhoyrub Chunder Sen, to be made to a servant of the plaintiffs, and that the defendant was not aware of the fact that the said Bhoyrub Chunder Sen was a servant of the plaintiffs, and that he was in charge of the said goods sold to the defendant, and delivered the same to the defendant; and that, besides being in charge of plaintiffs' goods of the description sold to the defendant, he had the charge of cash sales of certain other petty commodities not of the description sold to the defendant, the price whereof he was admitted to be authorized to receive; that although the whole of the goods were delivered as far back as November 1872, no notice was taken by, or given to, the plaintiffs of the payment of the price thereof, except the aforesaid, until about three months ago, when Madhub Chunder Sircar was prosecuted for embezzlement by the plaintiffs; that all goods delivered by Madhub Chunder Sircar were in the godowns of the plaintiffs, used to be delivered under the order of the firm, and that Madhub Chunder Sircar had no authority to deliver any goods without the firm's order, and that this authority was known to the defendant's broker, Bhoyrub Chunder Sen, and that it was not proved that any payments made by the firm on Madhub Chunder Sircar for the goods for which the plaintiffs allege that they were not paid for.

that the said Madhub Chunder Sircar was not, and that another person, *viz.*, the head of the cash office of the plaintiffs, was the person who usually received payments for them, gave judgment for the plaintiffs for Rs. 550, contingent upon the opinion of the High Court on the following questions, which he referred at the request of the defendants.

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"1st.—Whether the payments made to Madhub Chunder Sircar were payments to the plaintiffs?

"2nd.—The defendant never having had any credit transactions with the plaintiffs, and having sent money with his own broker, Bhoyrub Chunder Sen, to pay cash for the goods, whether or not he is liable to pay for such goods over again, if the money so sent by him did not actually reach the plaintiffs but Madhub Chunder Sircar?

"3rd.—Having regard to the length of time which elapsed between the last delivery and the institution of this suit, whether or not the presumption of law is that the plaintiffs recognized the payments made to Madhub Chunder Sircar?

"4th.—Whether or not the plaintiffs are guilty of such negligence as would debar them from recovering the sum claimed from the defendant?

"5th.—Can the plaintiffs adopt the delivery of goods by Madhub Chunder Sircar which are not proved to have been made under their orders, and at the same time refuse to adopt the payments made to Madhub Chunder Sircar?"

The defendant, for the plaintiffs, contended that the only question for the court on the facts as stated was, whether the defendant had received the goods, receipt of which he admitted; if not, the plaintiffs were not entitled to recover. Where there is a special place for payment in the case of a shopman authorized to receive goods, payment elsewhere than in the shop is not binding. *Brett* (1).

The plaintiff, for the defendant.—The action is for goods sold and delivered by the plaintiffs has not been proved, and the delivery by Madhub Chunder Sircar was not proved.

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unauthorized, and therefore tortious. The action should have been in trover, not in contract—*Read v. Hutchinson* (1). The only contract was for payment of “cash on delivery and before removal.” The receipt of the money and the delivery of the goods were parts of the same act. If the plaintiffs adopt their servant’s act at all, they must adopt it altogether; they cannot at one and the same time rely on the unauthorized delivery as a delivery under the contract, and yet repudiate their servant’s act in receiving payment—*Ramazotti v. Bowring* (2). [PONTIFEX, J.—That was a case of adopting or repudiating a contract; here the case is one of adopting or repudiating an act.] No doubt, and on that ground, it may be open to contention that the plaintiffs could not adopt the delivery at all, as it was “a bare act the effect of which would be to raise a duty towards them from the defendant”—*Smith’s Merc. Law*, pp. 155, 156; and *Story on Agency*, s. 246. The case may be put in another way. When an unauthorized act is adopted it is the same thing as if it had been authorized in the first instance: by adopting the delivery the plaintiffs authorized a departure from the usual course of business, and cannot therefore insist on the usual course being followed in the payment—*Ferguson v. Carrington* (3). The learned Counsel was proceeding to argue that the plaintiffs’ law afforded a ground of defence. [COUCH, C.J.—We cannot rely upon that, it is a question of fact, viz., whether it is not established that they knew of the delivery.]

Mr. *Evans* in reply.—The words “cash on delivery and before removal” do not make receipt of the money a part of the goods part of the same act. The evidence shows that they were to be two distinct acts performed at different times and by different persons. [PONTIFEX, J.—The delivery was the plaintiffs’ part of the contract, the payment was the part of the defendant.] Just so; the plaintiffs could not rely on the delivery by the servant whose duty it was to deliver the goods, and receipt of payment to a person not authorized.

(1) 3 Camp., 352. (2) 7 C. B., N. S., 851.

The opinion of the Court was delivered by

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COUCH, C.J. (who, after stating the facts, continued).— Taking the facts as stated, the case is really this. The defendant not being entitled to have delivery of the goods until he had paid for them, procured the delivery from Madhub Chunder Sircar, in a manner which he knew was not authorized by the plaintiffs, without the order of the firm, which it is found was not given, and which he knew ought to have been given. Having so obtained the goods, he makes a payment to Madhub Chunder Sircar, knowing that he was not the person who ought, according to the usage of the plaintiffs' office, and the way in which they carried on their business, to have received the money. We think this is not a case to be decided according to technicalities, as in an action for goods sold and delivered, and upon the plaintiffs adopting the act of their sircar. The substantial question is, ought the defendant, having got the goods, to avail himself of a payment for them, made in a manner in which he knew it ought not to have been made. We think that he ought not. The plaintiffs are entitled to be paid for the goods which he has taken delivery of, and it is immaterial in which form of suit they recover the money. It is only necessary to answer the first question which has been put to us, that payments made to Madhub Chunder Sircar were not due to the plaintiffs.

The plaintiffs will have judgment to recover the balance with costs of stating this case for the opinion of this Court, and otherwise arising out of or connected therewith.

For the plaintiffs: Messrs. *Berners, Sanderson, and*

For the defendant: Baboo *Gunnesh Chunder*

FULL BENCH.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp,
Mr. Justice Jackson, Mr. Justice Mitter, and Mr. Justice Pontifex.*

1878
July 14.

IN THE MATTER OF THE PETITION OF THE COLLECTOR OF
FURREEDPORE.*

*Appeal—Regulations V of 1812, s. 26, and V of 1827, s. 3—Order for
Attachment and Manager.*

No appeal lies to the High Court from an order passed by a District Judge, issuing a precept to the Collector to hold an estate in attachment and to appoint a manager, under s. 26, Regulation V of 1812, and s. 3, Regulation V of 1827.

THIS was an application by the Collector of Furreedpore, under s. 26, Regulation V of 1812, to exercise the power of attachment conferred by that section in respect of an estate called Roopapatha, the joint property of Ramarungini Dossee and Gurudoss Roy, on the ground of the existence of disputes between them, which were likely to lead to a breach of the peace and to oppression of the ryots.

The Judge found that disputes did exist between Ramarungini and Gurudoss Roy, which were likely to cause inconvenience to the public and injury to private rights and oppression of the ryots, and that sufficient cause had been shown to exercise the power conferred by Regulation V of 1812. He, accordingly, issued a precept to be issued to the Collector of Furreedpore to attach the said estate and to appoint a manager for the management thereof.

Gurudoss Roy appealed to the High Court.

The appeal came on for hearing before the High Court (Markby and Birch, JJ.), when their Lordships gave their opinion that, on the language of s. 26, Regulation V of 1812, no appeal would lie; but referring to the decision of the Sudder Court, 21st September 1832, as

* Miscellaneous Regular Appeal, No. 36 of 1878.
Judge of Zilla Dacca, dated the 16th November 1878.

their opinion, and remarking that such an appeal had been entertained in the case of *In re Muhinder Narain Roy* (1), they referred the following question for the opinion of a Full Bench:—

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IN THE
MATTER OF
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OF THE
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BURENDPORE.

“Whether there is an appeal to this Court against the order of the Judge of the District Court issuing a precept to the Collector to hold an estate in attachment and to appoint a manager, under s. 26, Regulation V of 1812, and s. 3, Regulation V of 1827?”

Mr. *Ghose* (Baboo *Hem Chunder Banerjee* with him) for the appellant, contended that, upon the wording of s. 26, Regulation V of 1812, an appeal would lie. An appeal was allowed to the Provincial Court. Construction No. 717 of the late Sudder Court, dated 21st September 1832, declared that the order was open to appeal, and such an appeal was entertained by that Court in the case of *In re Muhinder Narain Roy* (1). Under s. 23, Act XXIII of 1861, an appeal lies to the High Court from a decree or order passed by a Zilla Judge. The order appealed against in this case is in the nature of a decree. There is no Regulation taking away appeals in such a case. Besides, appeals were entertained by the late Sudder Court from orders under s. 26, Act V of 1812; see *In re Nil Madhoo Surma* (2), *In re Joy Gopal Pal Chowdhree* (3), and *In re* (4).

Proffers (Baboos *Shamloll Mitter* and *Anund Chunder* (m)) for the respondent, was not called upon.

The Full Bench was delivered by

The present appellate jurisdiction of this Court is founded on the words of the 16th clause of the Charter, which say that the Court is to exercise jurisdiction in such cases as were subject to appeal by virtue of any laws or Regulations in force

(3) Carrau's Sum. Ca., 116.

(4) *Id.*, 150.

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IN THE
MATTER OF
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OF THE
COLLECTOR OF
FARRUKPORE.

at the date of the Charter. We must, therefore, refer to the words of the first Charter, which in cl. 15 said that the Court was to exercise appellate jurisdiction in such cases as were subject to appeal to the Court of Sudder Dewanny Adwalut by virtue of any laws or Regulations then in force, or which should become subject to appeal by virtue of such laws or Regulations relating to civil procedure as should be thereafter made by the Governor-General in Council. In order that there should be an appeal to this Court in this case, it is necessary that there should be some law or Regulation giving it.

Regulation V of 1812, which gave to the Zilla and City Judges the power to appoint a manager, gives a limited appeal. It provides that "if the Revenue Authorities, or any of the individuals holding an interest in the estate, shall be dissatisfied with the selection made by the Zilla or City Judge of the individual to perform the duty in question, it shall be competent for them to represent their objections to the Provincial Court of Appeal, which Court will confirm the manager chosen, or order the Judge to select and appoint another person." These words exclude the supposition that there was to be an appeal upon the propriety of appointing a person to manage the estate, or upon the questions which the Zilla Court had to consider whether there was such inconvenience to the public or injury to private rights from the disputes amongst the proprietors of joint undivided estates as would be a sufficient cause for placing the management in the hands of a person appointed by the Court. This Regulation, instead of giving an appeal, orders that there shall be a manager, shows, so far as the opinion of the Legislature can be gathered from the words, that there was not to be such an appeal. And there are very good reasons for the exercise of a power of appointment being subject to an appeal to the Provincial Court. There is no other law or Regulation that we are aware of which has been referred to, which would give to the Court the power of entertaining an appeal against the selection in the description.

The appellate jurisdiction of the Provincial Court was conferred by Regulation V of 1793, s. 15.

speaks of all persons aggrieved by the decisions of the Zilla or City Courts being permitted to appeal, but the latter part of the section shows that what was intended to be appealed from were decrees of the Courts, and not an order of this kind. It would not be a safe or a proper way of construing an Act or a Regulation, where the word "decree" is used, to read it as if the words were "in the nature of a decree," as we have been asked to do. We should very often defeat the intentions of the legislative authority if we were to construe the statute law in such a manner.

The Construction of the Sudder Court was an extra-judicial opinion, given without any argument upon the question, and without its having been raised before the Court. We cannot consider that as having the authority of a decision of a Court pronounced in a judicial proceeding and after argument before it upon the question. There appears to be one case in which the Sudder Court allowed what was properly an appeal against an order of this kind; the other cases may rather be considered as an exercise by the Court of its superintending power than as an exercise in its proper sense of an appellate jurisdiction. I do not think that this decision of the Sudder Court can be considered to have the authority which would bring the matter within the clause in the Charter, which says that the appellate jurisdiction of this Court must be that which the Sudder Court has by the virtue of any laws or Regulations. I think we must hold that the appeal in this case does not lie to the High Court.

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*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp,
Mr. Justice Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.*

1873
Dec. 10.

UNNODA PERSAD ROY AND OTHERS (HEIRS OF PLAINTIFF) v.
ERSKINE AND OTHERS (DEFENDANTS).*

Co-sharers, Suit by one of Several—Cause of Action—Valuation—Jurisdiction—Parties.

Where a patni talook, belonging to several co-sharers each of whom collected his own share of rent from the mehal, was sold for arrears of rent, and one of the co-sharers brought a suit in the Munsif's Court to recover possession of his share by setting aside the sale, and valued his suit according to his share, making the other co-sharers defendants,—*Held* that the suit could not be maintained in that form. The cause of action was the sale of the whole estate, and the suit should have been framed and valued accordingly, and brought in a Court in which the rights of all the parties interested in setting aside the sale might have been declared in one suit.

In this case one Kassinath Roy sued certain persons, whom he described as "Messrs. Erskine & Co.," and eight other persons, alleging that a certain patni talook was held by several co-sharers, of which the plaintiff held one share, and certain of the defendants the remainder, each shareholder collecting his share of the rent from the mehal; that defendant No. 1, and others, had purchased the zemindari right over this talook, and that he had brought a suit before the Collector under Regulation No. 1819, praying for the sale of the patni talook on account of arrears of rent; and a sale of the patni talook had taken place; that the defendant purchased it himself, and that the plaintiff appealed to the Commissioner, and that the appeal was successful; that he, therefore, on the various grounds stated in the plaint, brought this suit in the Munsif's Court to recover possession of his one-seventh share by setting aside the sale, and valuing his suit according to his share. The Munsif's Court *held* that the plaintiff maintained an allegation that the plaintiff was a co-sharer.

* Special Appeal, No. 102 of 1873, against the decision of the Judge of Zilla Beerbhoom, dated the 23rd March 1873, and the decree of the Munsif of Doobrajapore, dated the 10th April 1873.

with his co-sharers, and that they were acting in collusion with the zemindar; but they were made defendants to the suit.

The suit was valued at Rs. 365, being the value of the plaintiff's one-seventh share.

The whole patni talook was registered in the plaintiff's name in the zemindar's serishtas.

Several other shareholders filed similar suits, each in respect of his own share.

Both the lower Courts, relying on *Biswanath Bhattacharjee v. The Collector of Mymensingh* (1), dismissed all the suits on the ground that a single suit ought to have been brought by all the co-sharers to set aside the sale and recover possession of the whole talook.

The several plaintiffs preferred special appeals to the High Court, but the present appeal alone was argued. The appellants were the heirs and representatives of the plaintiff who had died since the case was decided by the lower Courts. The appeal was heard before Markby and Mitter, JJ., who, in consequence of the case relied on by the lower Courts being in conflict with *Raghab Chandra Banerjee v. Brajanath Kundu Chowdhry* (2), referred to a Full Bench the question

Whether one suit by all the shareholders to set aside the sale and to recover possession ought to have been brought, or whether, as the appellant maintains, each shareholder was entitled to sue separately?"

Shotosh Mookerjee for the appellant.—This suit is brought—*Raghab Chandra Banerjee v. Brajanath Kundu Chowdhry* (2). There is an allegation in the plaint that the plaintiff did not join the plaintiff, and therefore they have been made defendants. All the parties are before the Court, and justice can take place. The plaintiff would be entitled to sue if such a suit did not lie. A suit must be brought for the relief sought. The real object of the suit is to recover possession of plaintiff's share,—that is the relief sought. We must ask that the sale be set aside.

(2) 9 B. L. R., 91, note.

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At any rate an order may be made for the consolidation of the suits. [COUCH, C.J.—We have no power to order a consolidation.]

The *Advocate-General*, offg. (Mr. Paul) (with him Mr. Allan), for the respondent, was not called upon.

The judgment of the Full Bench was delivered by

COUCH, C.J.—I think that, in deciding this case, we must take the latter part of the question which has been stated by the learned Judges, and take it in connexion with what the suit appears to be. We are asked whether, in a suit to set aside the sale of a property held by several shareholders, each of them is entitled to sue separately; and I think we must consider the question as meaning entitled to sue separately in the manner in which the present suit is brought. It is a suit to set aside the sale of the property. It is true that the plaintiff has made the other co-sharers defendants in the suit; but he has asked to have the possession of his own share. Although he may have in terms asked to have the sale set aside, he is by the valuation of his suit limited to the setting aside the sale of his own share only. By the framing of the suit in this way, he has brought it in a Court in which he could not have brought it if it had been a suit to set aside the sale as to the entire property. I think he was unable to sue in that way; he has in fact sued in respect of part only of the cause of action,—namely, the right to have applied only to himself; the cause of action was the right to the whole, and the suit ought to be framed and valued accordingly, and be brought in such a Court that the rights of all the persons interested in setting aside the sale might be protected by the suit. I think the decisions of the Courts below were correct, and that the appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Morris.

LALJEET SINGH (DEFENDANT) v. RAJCOOMAR SINGH
(PLAINTIFF).*

1873
Aug. 1.

Hindu Law—Mitakshara—Partition in Father's Lifetime—Mother's Share.

By the Mitakshara law a son may sue during the lifetime of his father for a partition of the ancestral property. On such a partition being made, the mother is entitled to have a share allotted to her, by way of maintenance or otherwise, equal to a son's share.

THIS was a suit brought by Rajcoomar Singh, a member of a joint Hindu family subject to the Mitakshara law, against his father Laljeet Singh and his minor brother Rajnarain Singh, for a partition of the ancestral property. The material defences raised by the defendant Laljeet Singh were that the mother of the plaintiff was alive; and that, under the Mitakshara law, she was entitled to a share on partition of the ancestral property, and was therefore to have been made a party to the suit; that as the plaintiff was still capable of bearing children, the plaintiff was entitled to claim a partition of the ancestral property; and that the plaintiff was estopped from claiming a partition, as he had renounced his right thereto by a chitta given by his father, whereby he was receiving a certain village from his father.

The Judge, while holding that the estoppel was established, decided the two former points against the plaintiff in his suit.

The Judge agreed with the first Court on the first point, but held that as the property was admit-

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even if the mother were still capable of bearing children; and that the mother was not entitled to any share on partition. He accordingly reversed the decree of the Subordinate Judge, and declared the plaintiff entitled to a one-third share of the property.

The defendant Laljeet Singh appealed to the High Court.

Mr. *Branson* (Mr. *C. Gregory* and Baboo *Romesh Chunder Mitter* with him), for the appellant, contended that, under the provisions of the *Mitakshara*, a partition in the father's lifetime against his wish could be effected only under the circumstances pointed out in Ch. i, s. 2, v. 7; but if that were not so, a division of ancestral property could only be enforced by grandsons born in the grandfather's lifetime, and in the present case the plaintiff was not shown to have been so born.

The mother is entitled to a share on partition of the ancestral property. In *Mahabeer Persad v. Ramyad Singh* (1), it was held that a widow is entitled to a share on partition of the ancestral estate. The suit is defective, as the mother has not been made a party defendant.

Mr. *Woodroffe* (Baboos *Mohesh Chander Chowdry* and *Kaliprosonno Dutt* with him) for the respondent.—The question whether the plaintiff was or was not born during the life of his grandfather is immaterial, and in fact was not raised in any of the lower Courts. The son, whenever born, acquires by birth a right in undivided ancestral property and

might on nominal partition : and that even

pre-existing right in ancestral estate—*Sheo Dyal Tewaree v. Jodoonath Tewaree* (1); hence she can never demand a partition. If the sons divide the estate after their father's death, she is entitled to a share in lieu of maintenance, because her maintenance has then become a charge on the estate in their hands; but so long as her husband lives, he is under a personal obligation to maintain her, therefore on partition in his lifetime she cannot claim a share in the ancestral estate as of right: moreover, any share allotted to her would have to be regarded as an increment to the father's share, since by Hindu law there can be no partition between husband and wife. Ch. i, s. 2, is said to declare her right to share on partition in her husband's lifetime, but it is submitted that that right is only declared with respect to self-acquired, and not to ancestral, property; see vv. 8 and 9, which refer to equal division by the father's choice, v. 6 having previously declared that he has no choice in the case of ancestral property.

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Mr. Branson in reply.

The judgment of the Court was delivered by

THE JUDGE, J.—In this case a son sues his father and his brother, a minor, to obtain partition of certain ancestral property, the family being a joint Hindu family governed by the Hindu law.

Principal questions have arisen in the suit: first, whether the son is entitled to obtain partition of ancestral property during his father's lifetime; and secondly, whether, if he does so, the mother is entitled, on the father's death, to a share by way of maintenance, or otherwise. It is admitted that the mother is alive, and the court has made her a party to the suit: not only has he made her a party to the suit, but he maintains that she is entitled to a share on any ground, and ought not to be a

just mentioned; the decision in

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Nagalinga Mudali v. Subbiramaniya Mudali (1) has determined that a son can sue during his father's lifetime for partition of the ancestral estate. A decision of a Full Bench of this Court, in *Raja Ram Tewary v. Luchmun Persad* (2), is to the like effect. Also a judgment, delivered by a Division Bench of this Court, in *Sheo Dyal Tewaree v. Judoonath Tewaree* (3), countenances the proposition that, on a division of the ancestral property during the father's lifetime, his wife is entitled to a share for her maintenance, although, no doubt, it does not judicially determine the point.

Notwithstanding these authorities bearing upon both these issues, it was very strongly urged upon us on behalf of the defendant on the one side, and on behalf of the plaintiff on the other, that neither proposition was well founded in Mitakshara law. We have thus felt it necessary to examine somewhat closely the text of the Mitakshara so far as it bears upon these two issues.

The first section of Ch. i may be described as an elaborate discussion, and somewhat artificial analysis of several ancient texts, serving to lead up to the conclusion that each member of a joint Mitakshara family acquires by birth a certain indefinite right of property in the paternal and ancestral estate; that the father, as head of the joint family, has independent power of disposal, for certain purposes, of the family property other than immoveable property, but is subject to the control of the sons and the rest of the family in regard to the immoveable estate, whether acquired by himself (though it must be acquired by the way that this is afterwards greatly modified (para. 10), or inherited from his father or other ancestor (para. 27); with, however, this one exception, namely, that while the members of the family are minors, or incapable of giving their consent, like, one member of the family may conclude a mortgage, or sale, even of the immoveable property, affecting the whole family require

(1) 1 Mad. H. C. Rep., 77.

(3) 5

render it necessary, or indispensable duties, such as the performance of the father's *sraddh*, make it unavoidable (para. 29). The three last paragraphs but one of the same section, i.e., paras. 30, 31, 32, furnish an interpretation of two or three texts, which without it would seem inconsistent with the foregoing view of the law, and explain that these texts only refer to certain precautionary formalities, which ought to accompany, but which are not essential to the validity of, any dealing with joint family property. And the last para. (33) reserves, to a later part of the commentary, the mention of a certain distinction between the right acquired by birth in paternal, and that in ancestral, estate. We find this distinction reasoned out in s. 5, and given concisely in para. 10 of that section. One effect of it is, as already stated, to relieve the father from the control of his sons as regards his acquired property.

The indefinite right in the joint property, which, as thus explained, is acquired by birth, is capable of being rendered personal (so to speak) and separate by partition, and in the next paragraph (which Mr. Colebrooke has made the first paragraph of s. 2) the commentator proceeds to consider "at what time, by whom, and how partition may be made." For this purpose he first cites the text of his author (Yajnavalkya), which runs thus: "When the father makes a partition, let him divide his sons from himself at his pleasure, and either dismiss one son with the best share, or if he choose, all may be equal." After developing this text slightly, the commentator says in para. 6 that the power of unequally distributing property, which it confers on the father, relates solely to acquired property, because, unquestionably, he has no power in regard to ancestral property, by reason of his ownership therein on the part of himself and his sons. The commentator undertakes to explain later, and in (as already mentioned) in para. 10 of s. 5, that this qualification, in effect may be put thus:— "When a father makes a partition, he may give his children such shares as he thinks fit, except that in partition he must give them equal shares." The general proposition from one

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text or authority, and then cutting it down by an exception made on the foundation of another, prevails through the whole of the commentary.

The commentator next proceeds to state the occasions on which a partition may be effected,—a step which ought logically to have been taken previously to making any mention of the father's powers of distribution, for, taken here, it effects a break in the continuity of the discussion relative to the question of shares on partition. These occasions are (para. 7): at the pleasure of the father during his life; at the pleasure of the sons after his death; and also at the pleasure of the sons during his life against his will, provided that certain specified events occur. Nothing appears here to limit the application of this passage to the partition of the father's self-acquired property only,—the partition of his property generally, ancestral as well as self-acquired, seems to be meant, and the Madras High Court has so interpreted the paragraph in *Nagalinga Mudali v. Subbira-maniya Mudali* (1).

This view is confirmed incidentally by a remark which is made by the commentator in para. 4 of s. 3, and which will be presently referred to. Besides these occasions of partition paras. 8 and 10, s. 5, no doubt, add another,—namely, at the pleasure of the sons during the father's life so far as respects ancestral property; and, therefore, the like result would, in the end, be reached, if one supposed the previously mentioned occasions of partition to have been spoken in regard to self-acquired property only, excepting that under the latter partition there would be no direct authority anywhere for the father's partitioning the ancestral property during his life, so that there is certainly no reason afforded for the result arrived at upon the exercise of the father's discretion. In short, there seems to be no cause to impeach the opinion of the Madras High Court, and much to confirm it.

At the point which we have now reached the discussion returns to the question relative to the power of the father. He says (s. 2, para. 8):

pleasure of the father have been stated,—namely equal and unequal;” and after quoting a text of Yajñavalkya—“If he make the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions”—he represents the effect of it to be that “when the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by the husband or the father-in-law, must be made participant of shares equal to those of sons. But if he give the sons unequal shares, his wives do not take such portions, but receive equal shares of that which remains after the allotments to the sons have been deducted”

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As in the previous section, there is nothing here expressed to limit the application of these passages to the partition of self-acquired property alone, unless it be the words “by his own choice;” but these seem to refer rather to the act of partition than to any discretion in regard to the magnitude of the shares; and the upshot of it all appears pretty plainly to be, that while the father, in partitioning the property which he has, of whatever kind, may, in some cases, make a difference in the shares which he gives to his sons, he must in no case make any difference in the shares which he gives to his wives. There arises, further, the inference that, in all cases of a partition by the father, his wives are entitled to the shares mentioned; and this inference is confirmed by para. 1 of s. 7, which will be quoted

In the remaining paragraphs of s. 2, the commentator points out the cases in which a father may be justified in giving even unequal shares to a son, and also that a legally effected partition by the father in unequal shares cannot be set aside. It is done when the father has acted under undue

In s. 3, the question of partition at the death of the father and mother is discussed. On this particular topic is a little more said, yet the reasoning by which the children should divide only in equal

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shares (para. 7)—is reached, exhibits some points which are of use to us, and for that cause has been already alluded to. At the outset of the section the commentator represents his opponents as objecting that such texts as that of Yajnavalkya (quoted in s. 2)—“let him either dismiss the eldest with the best share”—sanction an unequal distribution of property when the division is made in the father’s lifetime; and that, consequently, an unequal division is admissible at every period; but the answer which the commentator makes is not that these texts were delivered in view of a special partition, as of self-acquired property only, but “true this unequal partition is found in the sacred ordinances, but it must not be practised,” because, amongst other things, there exist counter or qualifying maxims and texts. The commentator then goes on to argue that, inasmuch as Apastamba declared that “a father making a partition in his lifetime should distribute the heritage” (i.e., the ancestral property, see s. 1, para. 2) “equally among his sons,” therefore, the sons dividing his property after his death (when it must all of it necessarily be in the situation of ancestral property) must divide it only equal shares.

We thus see it disclosed that the texts quoted in s. 1 are quite general in their original meaning, and are only restricted in operation, so far as they are restricted at all, by the other qualifying texts. We also see it recognized that the incidents of a partition effected at the instance of the sons must correspond strictly with those of a partition of property effected by the father. In this way it is made once that the view which the Madras High Court has taken of the general scope of para. 7, s. 2, is correct. The directions of paras. 9 and 10 of the same section, as regards shares of widows are equally general, and the directions apply to partitions effected at the instance of the sons as well as those effected at the father’s own instance.

The paragraphs of s. 4 only describe a partition of a nature that it ought not to be made. In s. 5 again revert to the distribution of property at partition. First we had the case

his own will during his lifetime; secondly, partition effected by the sons after the death of both father and mother of property generally which had been held by the father. Here we have something supplementary and more particular: the commentator declares that, in the distribution of the grandfather's (*i.e.*, ancestral) property, whenever the partition takes place, the adjustment of the grandsons' share must be effected through their fathers; thus, if the father is dead when the partition takes place, the grandsons only get the share which would have fallen to their father had he been alive at the partition, and if he is alive they only share with him what he gets. But the commentator states emphatically that in that share they are co-owners with the father; and on a partition of it have equal rights with him independently of his will; and he is at much pains to combat the contrary notion, saying in particular that the text "when the father makes a partition," &c., which has been already quoted, and others, so far as they countenance unequal distribution by the father, apply to his self-acquired property only. He goes on further to pursue this doctrine to its consequence, and in paras. 8 and 11 demonstrates that the son can at any time during his father's lifetime demand, whether his father be willing or not, a distribution of the ancestral estate. Finally, in few words (para. 10) he sums up by stating the difference in the son's right to the self-acquired and the ancestral property—the distinction which he had previously promised to make. The paragraph runs as follows:— "The difference is this,—although he has a share in his father's and in his grandfather's property, his share is dependent on his father in regard to the self-acquired property, and since the father has a predominant interest in it, by himself, the son must acquiesce in the partition of his own acquired property; but since both have a right in the grandfather's estate, the son is not under interdiction if the father be dissipating

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question, "how shall a share be distributed frequently to a partition of the estate at length with reference to the

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text, "When the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution;" and the substance of the answer is, that he only gets a share of that which is left with the father and mother after the partition, and has no right whatever in that which had been allotted to his separated brothers; while they also, on the other hand, retain no right to any other portion of the father's estate of whatever kind, and get none in anything which the father may subsequently acquire.

A passage in the 2nd paragraph of the section, in which it is said generally of the after-born son, of the text, "what is distributed, is distribution, meaning the allotments of the father and mother; he shares that,"—seems inferentially to show that in any distribution obtained during the lifetime of the father, without limitation as to the nature of the property, a share is allotted to the mother as well as to the father, and this seems to be quite clear by the first paragraph of s. 7, which is as follows:—"When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed: 'if he make the allotments equal, his wives must be rendered partakers of like portions—Yajnavalky." The author now proceeds to declare their equal participation when the separation takes place after the demise of the father. 'Of heirs dividing after the death of the father, let the wives also take an equal share.'" The remainder of the section is taken up with the discussion of the rights of the unmarried daughters as against the sons on a partition effected after the death of the father; but with this we are not now much degree concerned, because the 14th and last paragraph of the section declares that it is only after the decease of the father that the unmarried daughter participates in the partition. Before his death she obtains that only, whatever the father gives.

Thus, upon a review (unfortunately so far as the present case is concerned) of that part of the Mitakshara which deals with the two principal issues which arise out of the case, there can be no real obscurity. The result of the case, so far as is concerned, may be stated very

during his life, may, at his pleasure, partition the whole of the property in his hands or any of it, and if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself; also the sons can, at any time during the father's life, at their pleasure (even when any of the contingencies which entitle them to divide the whole estate have not happened), call upon him to partition the ancestral property, and in that event also the mother must have her share as before. After the father's death again the sons may divide the property among themselves, but then, too, they must give a share to their father's widow, and to an unmarried sister, if there is one. In all the cases alike the mother's share in the ancestral property must be equal to that of a son.

It follows then that we must determine the first of the two issues before us in favor of the plaintiff, but the second issue against the plaintiff. The mother being entitled, as we understand the text of the Mitakshara, to a share in the ancestral property by way of maintenance upon the occasion of a partition being effected at the instance of the son, she ought to be a party to this suit; and inasmuch as she has not been made a party, the suit in its present form must certainly fail.

The only question which remains is, whether or not we ought to give the plaintiff any facility for the purpose of enabling him to proceed on the suit upon the basis of the present plaint, by allowing him to amend it, and to make the mother a party on the same?

We have that, supposing the mother to be thus made a party, there is already one issue of fact, and there may arise another issue upon which she will have a right to bring evidence. It is not upon a complete rehearing of the case. There is no actual agreement between the parties as to what is to be divided. And again the father, who has already set up that the plaintiff is estopped, by his own conduct, when on a former occasion, from claiming a share in the ancestral estate, even assuming he is allowed to amend.

We are inclined to the conclusion that this amendment should be refused to the plaintiff. But

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unquestionably the mother would be entitled, if she were advised to require it, and were upon the record, to have that issue tried afresh, and to offer additional evidence upon it. So that if we send back this case with the direction that the mother be put upon the record in order that the plaintiff may be enabled to carry on the suit properly, there must necessarily be a new trial in the first Court with regard to the facts which constitute the general merits of the case.

This being so, we are bound to look at the behaviour of the plaintiff to satisfy ourselves whether or not he is entitled to this indulgence at our hands. Now it is quite clear that he has, from the commencement, as has already been stated, not only omitted to put the mother upon the record, but persistently refused to acknowledge her right to a share, and has up to this last Court of Appeal most strenuously fought out that issue. We find, moreover, that both the Courts below are of accord with regard to the character of the contest between the plaintiff and his father. The lower Appellate Court says: "that the facts seem to show that the plaintiff is a profligate spendthrift whom his father has attempted to control, and yet the latter must assist the extravagant in dismembering the estate in spite of his father's objection."

We think, having regard to this finding, and to all the circumstances of the case which have been referred to, we ought not to afford the plaintiff any special indulgence in this matter. The suit cannot go on as it is at present framed, and we shall limit ourselves to reversing the decision of the lower Appellate Court, and dismissing the plaintiff's suit. This decision, will, of course, be without prejudice to the plaintiff to bring a future suit for partition making such persons parties to it (1).

(1) See next case.

ORIGINAL CIVIL.

*Before Mr. Justice Macpherson.*JODOONATH DEY SIRCAR AND ANOTHER v. BROJONATH DEY
SIRCAR AND ANOTHER.1874
Jan'y 26*Hindu Law—Partition by Sons—Widow's Share,*

On partition of the family property by the sons after their father's death, the mother is entitled to share equal to that of a son.

If she has before the partition received property from the father, either by gift or will, amounting to more than a son's share, she is entitled to nothing more on partition: if she has received less, she is entitled on partition to as much as will make what she has received equal to a son's share.

THIS was a suit for partition of joint family property. Gobindchunder Dey, a Hindu inhabitant of Calcutta, died on 21st January 1871, possessed of considerable moveable and immoveable property, mostly situate in Calcutta, and leaving him surviving his widow Anundomoyee Dossee, one of the defendants, three sons, Judoonath and Kissorynath, the plaintiffs, and Brojonath Dey, one of the defendants, and one daughter Gumbini Dossee. By his will, dated 12th September 1870, he appointed the defendant Anundomoyee Dossee executrix with full authority and responsibility to perform certain duties according to his instructions embodied in the will. After making provision for the payment of various legacies, and for a provision for his great-grandsons, and failing them his sons, in a postscript to his will, he made the following bequest to his widow Anundomoyee Dossee:—

"Company's papers which I have purchased and kept in my possession, my wife, she shall be able, when necessary, to make use of them; and none of my heirs shall be able to make any objection to the ceremonies of her *adya-sradda* shall be performed; and the sale of Company's papers of the Company shall be made in her name; and the duties she shall be performed."

Plaintiffs Brojonath Dey Sircar
Defendants Anundomoyee Dossee,

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praying that the will of Gobindchunder might be construed and the rights of the parties entitled under it declared: and in that suit a decree was made on 13th September 1871, by which it was declared that, subject to the payment of the legacies and the religious and other trusts directed by the will, so far as the same were valid in law, and capable of being carried into effect, the present defendant Brojonath Dey Sircar and the present plaintiffs, as the sons and heirs-at-law of the testator, were jointly entitled to his estate; and it was further declared that the defendant Anundomoyee Dossee was entitled to the Company's paper bequeathed to her in the postscript to the will; and it was further ordered that the further hearing of the suit should be adjourned in order that certain accounts and enquiries should be taken and made (1).

The defendant Anundomoyee did not ask for maintenance in that suit. The accounts and enquiries, directed by the decree of 13th September 1871, were taken and made by the Court, and on 20th January 1873, the suit came on for final disposal before Macpherson, J., when an application, on behalf of Anundomoyee, for an enquiry as to what sum she was entitled to for maintenance, was refused, and a final decree was made in the suit.

The plaintiffs now sued for partition of the property to which by the decree of 13th September 1871, they were declared entitled jointly with the defendant Brojonath Dey Sircar, after reserving out of the estate a sufficient sum for the purposes directed by the will, and confirmed and declared valid in law by the decree of 13th September 1871 and 20th January 1873, and for the maintenance of the defendant Anundomoyee Dossee. The defendant Brojonath Dey Sircar, in his written statement, stated that he did not oppose a partition of the property made, but objected to any sum being set apart for the maintenance of Anundomoyee, she having been provided for under the will of Gobindchunder, and the property made to her by him during his lifetime.

The defendant Anundomoyee Dossee submitted that, in the event of a partition, she should have allotted to her a share equal to that of the other parties.

(1) See a report of the

sons of Gobindchunder. Anundomoyee had taken under the will about Rs. 14,500, besides gifts to her by her husband before his death. The question was whether she was entitled to anything further. The plaintiff Judoonath died after the suit was instituted, leaving a will, of which he appointed his mother Anundomoyee Dossee executrix. Anundomoyee was, therefore, made a plaintiff in the suit as representing her son Judoonath, she being already a defendant in the suit.

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Mr. *Macrae*, for the plaintiffs, stated that they were willing that a sum should be set apart for the maintenance of the defendant Anundomoyee Dossee on a partition of the property being come to. He referred to Dayabhaga, Ch. iii, s. 2, vv. 29, 31; and Shama Churn's Vyavastha Darpana, 480.

Mr. *Piffard* (Mr. *S. Davis* with him), for the defendant Brojonath, contended that the defendant Anundomoyee was entitled to nothing at all for maintenance. She had been already provided for by the will, and an application made by her for enquiry into her maintenance had been refused; at any rate that she had already received must be taken into account—Strange's H. L., 171; Macnaghten's Cons. H. L., 57.

Mr. *Lowe*, for Anundomoyee Dossee, contended that the maintenance of Anundomoyee was a charge on the whole estate. The testator might have left the property to a stranger, and not with his widow's maintenance. The authorities cited were to the contrary. The widow is entitled to a share equal to son's share. She cannot ask for partition, but has a right to maintenance; see Macnaghten's Hindu Law, Edition 1861, p. 100. *Shama Churn Mullick v. Janova Dossee* (1).

The decrees of 13th of September 1871 and 13th of October 1873 give the widow all the rights she is entitled to. It was not one of the rights declared. She had asked for maintenance, but the Court for an enquiry to be

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made as to her maintenance, and her application was refused. She is not entitled to a share if she has already received a sufficient sum to maintain her—Shama Churn's Vyavastha Darpana, 424, 425. The utmost she could ask for would be an enquiry as to whether what she has received is sufficient.

The judgment of the Court was delivered by

MACPHERSON, J.—The first question in this suit is whether the plaintiffs are entitled to have a partition of the property which belonged to their father, and is now held by them jointly with the defendant Brojonath. It is contended that by reason of what has occurred in the former suit, the three sons are entitled to a partition, each taking one-third. On behalf of the mother Anundomoyee it is said, that if there is to be a partition amongst her sons, she is entitled to a share equal to a son's share; but it is also argued that, under the will of the father (although that will has been partly set aside in the other suit), the estate is still impartible, and that the grandsons' maintenance is a charge on the estate. There is, however, no doubt that all the clauses of the will making the estate impartible (including the one which relates to the maintenance of the grandsons) have been set aside by the decrees in the former suit.

Mr. Piffard, for the defendant Brojonath, contends that the mother cannot now claim maintenance, because in the former suit the Court held she was not entitled to maintenance. But the Court did decline to make any special provision for maintenance, it did not say that she no longer had any right to maintenance: and the decree is in fact silent on the subject. She certainly has a right to maintenance: and as this suit is to be a partition, the only question is as to whether she is entitled in lieu of maintenance.

As a general rule, a mother is, on partition, after the father's death, entitled to a share. There being three sons, the property should be divided into four shares, one for the mother for her life. But in this instance, received a considerable

of the father. She having been thus in some degree provided for by her husband, the question arises whether she is entitled to any, and, if to any, what share. I entertain no doubt that the rule in such a case is that the mother is entitled to such a share as, taken with what she has already received from her husband, will give her a share equal to the share of a son. If under the will Anundomoyee has already received more than such a share, she is now entitled to nothing further. If she has received less, she is entitled to the difference between what she has already received and the share of a son.

The Hindu law on the subject is the same in principle in the case of a partition between a father and his sons in the mother's lifetime, and in the case of a partition between sons after the death of the father. And there is clear authority for saying that in the case of partition in the father's life, the rule is such as I have indicated. In the Vyavahara Mayukha, Ch. iv, s. 4, v. 15, it is said:—"In a case of equal partition between a father and his sons, a share belongs also to the wife; says Yajna-*valkya*:—"If he make the allotments equal, his wives, to whom no separate property had been given by the husband or the father-in-law, must be rendered partakers of like portions.' If any had been given, they are only to get half, for he adds, 'or if had been given, let him assign the half.' The half, meaning as much as with what had been before given as separate property (*stridhan*) will make it equal to a son's share. But if property be [already] more than such share, no share is to be given her." Again in the Dayabhaga, Ch. iii, s. 2, v. 31, it is said:—"The equal participation of the mother with the sons has the effect if no separate property had been given to the sons; but if any have been given, she has half a share. If a man make an equal partition among his sons, all his sons, if no issue must have equal shares with his wife. To a woman whose husband marries a son, she is to have an equal sum as a compensation for her share. If no separate property have been given to the sons, and if any have been assigned let him allot to the mother the following commentary on the rule. If the allotment of a moiety implies

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that the other moiety is completed by the woman's separate property. Else so much only should be given as will make her allotment equal to the sons." So in Colebrooke's Digest, Bk. v, s. 2, v. 87, as regards presents to be given to a second wife:—"To a woman whose husband marries a second wife, must be given an equal present on that second marriage, or equal to what the new wife shall receive on the nuptials, if she had herself received none of the wealth usually given to women; but if such wealth had been delivered to her, she is held entitled only to a moiety or part of the gift at the second wedding." In the note, Jagannatha says:—"Moiety (*ardha*) in the masculine gender signifies part in general, not equal parts, or exact half, which is signified by the same word in the neuter gender."

I think these authorities show, and the reason of the thing would lead to the same conclusion, that the expression "half" as applied to the share to be taken by a wife or mother is not to be read as meaning "half" literally, but as meaning such portion as may with what she has already received give her an equal share. Altogether, I have no doubt that, according to Hindu law, the mother is entitled to as much as, and no more than, will make what she in the whole received from her husband's estate equal to a son's share.

The decree will direct an enquiry as to the value of the property not disposed of by so much of the father's will as has been declared valid,—that is to say, the value of the undivisible now must be ascertained, as also the value of the property received by the mother from the father's will. If it shall appear that what she has received from the will and otherwise from the father is less than her son's share, so much shall be allotted to her as will make her share equal to her son's share.

By consent the family-house (No. 30) was not included in the inquiry. The decrees in the other suit must be taken into consideration and of course the partition can be made without a separate suit not required for that purpose supplemental to the former suit.

be considered as taken in both suits. No order will be made as to costs at present.

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Attorneys for the plaintiffs: Messrs. *Gray and Sen.*

Attorneys for the defendant Brojonath Sircar: Messrs. *Rogers and Remfry.*

Attorney for the defendant Anundomoyee Dosssee: Baboo *R. N. Bose.*

PRIVY COUNCIL.

PAHALWAN SINGH AND OTHERS (PLAINTIFFS) v. MAHARAJA
MUHESHUR BUKSH SINGH BAHADOOR (DEFENDANT).

P. C.*

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June 8.

[On Appeal from the High Court of Judicature, North-Western Provinces,
Agra.]

Act VIII of 1859, s. 14—Jurisdiction—Suit for Land—Res Judicata.

brought a suit in the Court of *S* against *B* for certain land as being an
tion to an estate in the district of *S*. *B* claimed it as being part of his
in the district of *G*, to which district he alleged the land had in a former
been found to belong. The Court of *S* held that the land was an
to *A*'s estate in the district of *S*. In a subsequent suit brought by
Court of *G* against *A* for the land to which the subject of the former
found to be an accretion,—*Held*, that the holding in the former
decided that the land claimed by *B* was in the district of *S*,
that the Court of *G*, under Act VIII of 1859, s. 14, had no

decision of the High Court at Agra, dated
reversing a decision of the Principal
Mepore, on the ground that he had,
1859, no jurisdiction to entertain the

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CHILIER.

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In a former suit brought in the Shahabad Court by the present defendant, Maharaja Muheshur Buksh Singh against the present plaintiffs, the Maharaja claimed as an accretion to his settled estate in the district of Shahabad certain land, which was colored yellow in a map produced in that, and also in the present suit (1). The defence then raised was that this yellow land was not alluvial at all, but had been all along part of the defendants' (the now plaintiffs') estate in Ghazeepore, or if alluvial, that it was an accretion to that estate. An objection was also raised to the jurisdiction of the Shahabad Court, on the ground of a decision on the point by the Collector of Ghazeepore; this objection, however, was overruled. Both the Principal Sudder Ameen and the High Court, on appeal, held that the yellow land was an accretion to land to the west, which was colored green in the map, and that it was part of the Maharajah's settled estate in Shahabad.

The present suit, which was instituted after the date of that decision, was brought in the Court of the Principal Sudder Ameen of Gazeepore to establish the plaintiffs' title to, and to obtain possession of, the land colored green in the above-mentioned map, as being part of their Ghazeepore estate.

To this, in addition to contesting the suit on the merits, Maharaja objected that, under s. 14 of Act VIII of 1859, Principal Sudder Ameen of Ghazeepore had no jurisdiction after the decision of the High Court of Calcutta.

The Principal Sudder Ameen, however, decided in the plaintiffs' favor both on that ground and on the merits so far as the portion of the land was concerned, but his decision was reversed on appeal by the High Court at Agra. The judgment of the High Court, so far as it related to the question of jurisdiction, was in the following terms:—

"The claim in the present suit is to obtain a decree for possession of, the plot of land colored green in the map to the north-west, west, and south-west, which was the subject of the former suit. It is admittedly, belongs to the defendant.

(1) A copy of this map will be found in a report of that case, on

"It is contended that the land in suit is not situated within the jurisdiction of the Courts of these provinces, and that it has been so adjudged by competent authority.

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"We are constrained to admit the validity of this plea. We agree with the High Court of Calcutta, and with the First Division Bench of this Court, that the Boundary proceedings in the Court of the Collector of Ghazee-pore did not debar the Principal Sudder Ameen of Shahabad from considering and disposing of the question of jurisdiction, which was raised before him. The Principal Sudder Ameen of Shahabad considered the decision of the question of jurisdiction involved in the determination of the issues raised on the merits. He held (as we understand his judgment) that the land then in suit was situated within the local jurisdiction of the Shahabad Court, because it was an accretion to estates lying within the area of the local jurisdiction of that Court. He held that the land then in suit was formed by gradual accretion; that it had accreted to the land lying immediately to the west of it, which land he considered (as we think erroneously) to have been admitted to belong to the then plaintiff as a part of his estates in Shahabad. Now this land, immediately to the west, is the land colored green, which is the subject-matter of the present suit.

"Inasmuch, then, as the land colored yellow, the subject-matter of the former suit, was held to be within the local jurisdiction of the Court of Shahabad, because it was an accretion to the land colored green, we are constrained to admit that there has been an adjudication by competent authority as to the situation of the land now in suit with reference to jurisdiction which bars the cognizance of this suit by the Courts of the Provinces. We, therefore, annul the decision of the Principal Sudder Ameen of Ghazee-pore, and direct that the plaint be

the decision the plaintiffs appealed to Her Majesty in

and Mr. *Leith* for the appellants.

and Mr. *Doyne* for the respondent.

as to the merits of the case, the judgment on the preliminary point of jurisdiction.

the following judgment:—

their Lordships have at present to
of the High Court of the

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North-Western Provinces, which is under appeal, has entirely proceeded, *viz.*, whether the Ghazeepore Courts had jurisdiction to try the cause, having regard to the 14th section of the Code of Procedure? That article is in these words (*reads s. 14*).

The High Court of Agra have come to the conclusion that that section was a bar to the present suit, and that it was their duty to act under the latter part of the clause in question. Their Lordships are of opinion that that was a correct decision upon the section as applied to the facts of this case.

The question, as it seems to their Lordships, is what was the *res decisa* in the former case? In that suit an objection was taken, similar to that which is taken in this suit, to the jurisdiction of the Shahabad Court. It was treated as if the land in dispute was within Zilla Ghazeepore, or an accretion to land in the possession of the defendants, which belonged to Zilla Ghazeepore, and it was contended that by reason of a former decision of the Collector of Ghazeepore, the latter part of this section applied, and that the Court of Shahabad had no jurisdiction to entertain the suit. That was decided against the defendants in that suit, who are the plaintiffs and appellants in this suit.

In order to decide that case, the Principal Sudder Ame who was the Judge of first instance, thought it advisable to take the question of jurisdiction, together with the merits of the case, and he came to the conclusion that the whole of the land colored yellow in the map which has been produced in the suits,—and it is the most favorable way of putting the case,—for the appellants to suppose that nothing but the land then in dispute,—was an accretion to the plaintiff's settled estate in Shahabad. That decision was affirmed by the High Court. It then came here upon appeal to the Board, confirming generally the decision of the High Court. It held that, treating the whole of the land as an accretion, there were grounds for dismissing the defendants, the present appellants, from the land, which had formerly, at all events, been in the possession of the plaintiff, but that the other land, the land which they drew, was to

land marked green; and that the plaintiff, the Maharaja, in that suit, was entitled to recover that as an accretion to his settled estate; affirming, therefore, with the above exception, all that had been done by the Courts below, *viz.*, that the land was alluvial land, and that it was an accretion to the settled estate of the plaintiff in Shahabad.

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Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit. And it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharaja in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence, it is obvious that, if an accretion to his land, it could be an accretion to nothing but the settled land. The accretion was found to be an accretion to his settled estate in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate in Shahabad.

It seems, therefore, to their Lordships that the decision of the Court of the North-Western Provinces was correct, and in the case, their only duty is to advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

By Mr. Wilson.

Messrs. Burton, Yeates, and Hart.

P. C.*
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March 14,
15, &
April 20

RAMALAKSHMI AMMAL (DEFENDANT) v. SIVANANANTHA
PERUMAL SETHURAYER (PLAINTIFF).

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law—Impartible Zemindari—Inheritance—Custom—Evidence.

By the general Hindu law where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succession as between sons by different wives (other than the first wife) of equal caste, is to be determined by the priority of birth of the sons, and not by the priority of marriage of their respective mothers; and therefore with respect to the succession to an impartible zemindari in the district of Tinnevely in the presidency of Madras, the son of the third wife is, in the absence of proof of any special custom or family usage to the contrary, to be preferred as heir to a subsequently born son of the second wife.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence.

APPEAL from a decision of the Madras High Court (Scotland C.J., and Holloway, J.), dated the 12th of February 1866 reversing a decision of the Judge of Tinnevely, dated the 1st of August 1864.

The suit was brought to recover an impartible zemindari at Urkadu, in Tinnevely, which the plaintiff claimed as the son of the late zemindar, Kolalinga Sethurayer. The defendant had married three wives: the first of whom died, and the second wife was the defendant Ramalakshmi. She opposed the plaintiff's claim on behalf of her mother, Ramalinga Sethurayer; and the third wife was the plaintiff's mother.

The plaintiff claimed to succeed under the custom of primogeniture, and also under the ordinary law of succession. The defendant on the other hand claimed to succeed as the son of the late zemindar.

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her son, though younger than the plaintiff, was the rightful heir, her own marriage having been prior to the marriage of the plaintiff's mother.

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The Judge of Tinnevely decided in favor of the defendant's son, but the High Court reversed that decision; and the defendant thereupon preferred the present appeal to Her Majesty in Council.

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Sir *R. Palmer*, Q.C., and Mr. *Bowring*, for the appellant.

Mr. *Leith* and Mr. *Grady* for the respondent.

The following authorities were referred to:—Menu's Inst., Ch. ix, ss. 105—107, and 122—125; Colebrooke's Dig., Bk. v, Ch. i, s. 1, art. 2; 1 Strange's Hindu Law, p. 56; Strange's Manual, p. 146; *Bhujangrav bin Davalatrav Ghorpade v. Malojirav bin Davalatrav Ghorpade* (1), and *Sivanananga Perumal v. Muttu Ramalinga Sethurayer* (2).

Their LORDSHIPS gave the following judgment:—

This is an appeal from the High Court of Madras in a suit raising the question of the right of succession to an impartible *Madari* called *Urkadu*, in Tinnevely. The litigants are sons by different wives of *Kolalinga Sethurayer*, the late

Sethurayer, who was a Hindu, married three times. His first wife, *Kanthunathi Ammal*, had no child. His second wife was *Ramalakshmi Ammal*, the mother of *Muttu Sethurayer* (the appellant), and *Vellaithai Perumal* (the respondent). His third wife was *Sivananantha Perumal* (the

respondent). *Ramalakshmi*, is appellant as guardian of *Muttu Sethurayer*. It is convenient to speak of him as the appellant and *Vellaithai Perumal* as the respondent. The suits were taken out on the same day and the priority in time of the suits was contested in the suit. The Courts

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in India have held that the marriage of the appellant's mother was first solemnized, and that she, therefore, in order of time, was the second wife, and the respondent's mother the third wife, of the zemindar. In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they, therefore, adopt it in dealing with the present appeal.

It appears that at the date of the marriages the appellant's mother was a child, only ten years old, whilst the mother of the respondent was a girl of sixteen. The respondent, as might naturally be expected from the relative ages of the mothers, was born many years before the appellant, and he seeks to recover the zemindari in this suit as the first-born son of the zemindar. The appellant resists his claim on the ground that he, as the son by the earlier marriage, is the rightful heir. The question is thus raised whether the son of the second wife, although born after the son of the third wife, is entitled to inherit; in other words, whether the priority in birth of the sons, or the priority in the marriages of their mothers, both being of the same caste, is to prevail in determining the succession to an impartible zemindari in this district of Madras.

It appears from the pleadings and issues that the respondent, as the first-born son, relies on the general Hindu law of succession, and on the custom of the family, which he affirms to be in accordance with it.

The appellant alleges that, by the custom of the district, he is entitled to the succession, and he also denies that the Hindu law is in favor of the respondent's claim.

Their Lordships are fully sensible of the justice of giving effect to long established usages in particular districts and families in India, but they are of opinion that, of special usages, modifying the ordinary law, they should be ancient and invariable, and that they should be established to be such by convincing evidence. It is only by means of such evidence that Courts can be assured of their existence, and the conditions of antiquity and invariability are legal title to recognition depends upon them.

In the present case their

High Court that the appellant has failed to prove the special custom which he undertook to establish.

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It appears from the record that, in 1861, during the life of their father, the late zemindar, the appellant brought a suit in the Civil Court of Tinnevely against the present respondent to have his right to the succession declared. He founded his claim on the usage in his father's zemindari and "other zemindaris." The present respondent then relied, as he still does, on the general Hindu law and the usage of the family. The Civil Judge was of opinion that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the zemindars of the district that the son of the senior wife was to succeed. The decision of this Judge in favor of the present appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the father; but it has been necessary to advert to the suit, because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage is concerned, principally of the testimony of the late zemindar himself, who was a party to the declaratory suit, and evidently he is not a trustworthy witness, for whilst in that suit he espoused the claim of the present appellant, and gave evidence of the family usage in his favor, he had some years before, and after his sons were born, given equally strong evidence of a custom in support of the claim of the present respondent. It is also stated that the zemindar's testimony was influenced by his desire to secure the property for one son or the other at the time of giving it, and is therefore entirely untrustworthy. The other evidence is equally insufficient to establish any family custom. In the present suit both the Courts in India have so

the usage of the district set up by the Court, apart from the conflicting evidence which appears on the record, is a custom alleged to have been made by the following circumstances. In the

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year 1849, the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor sons of the zemindar of Parayur was to succeed him, requested the Collector of Tinnevely and Madura to ascertain the rule of succession "as regards sons by different wives," and it appears from the Collector's letter to the Secretary of the Board, that the opinions of twenty zemindars and poligars were collected, copies of which he sent, giving also, at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable and perhaps undue laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained, before secondary and inferior evidence is received. There seems to be no reason in this case why the zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none called, but even their written opinions, as they gave them, were not produced. Their Lordships consider, agreeing with the Court, that the only evidence offered, *viz.*, the Collector's letter and summary, was not properly admissible, and could not be safely relied on as affording clear proof of the existence of an ancient custom in the district.

The summary of the Collector's letter, which is now produced, discloses that the zemindars were asked to give their opinions of the custom; and it further appears that the evidence given with reference to the custom was given by a single family of a different caste. The

those vouched, differed from the majority, and declared that the eldest son, although by the junior wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and zemindari.

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It was insisted by the learned Counsel for the appellant that the fact that the priority of the marriages of the second and third wives was made a question in the declaratory suit and in this suit and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the zemindar's lifetime, and to which he was a party, the zemindar himself, contrary to his former view, set up the custom which would give the succession to the appellant, whom he was then supporting, in opposition to the respondent, his eldest son. When the father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom. The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindu law applicable to this disputed succession.

The case stands in this respect in the same category as that relating to the zemindari of Shivagunga, which was decided by this Board in 1863 (1). Their Lordships, in that appeal, say:—"The zemindari is in the nature of a municipality, impartible, and capable of enjoyment by one member of a family at a time; but whatever custom of descent may heretofore have prevailed, it is now admitted to be that of the general law of that part of India, with such

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qualifications only as flow from the impartible character of the subject." Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact that succession by primogeniture is the rare exception to the ordinary rule in Hindu families, taking place only upon the descent of some impartible subject, as a raj or office; and that in most cases of the kind there has, probably, been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded. The learned Counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindu is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this, the first-born son is, throughout the books of authority, pre-eminent amongst his brothers, and held to be entitled to many special privileges. It will be found, in many authorities and instances, that, although the father follows the general rule, descends upon all his sons, yet, when it becomes necessary to make a distinction, preference is given to the first-born. Thus, Menu, after laying down the general rule of succession that brothers divide the patrimony, adds:—"The eldest brother takes the first share of the patrimony; and the others may take their share under their father, unless they have a son." (Menu, s. 105. "By the eldest, at the death of the father, having begotten a son, dischar

The eldest son, therefore, ought, before partition, to manage the whole patrimony;" Ch. ix, s. 106.

"That son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty;" Ch. ix, s. 107; see also ss. 137, 138.

Many of the precepts of Menu have been undoubtedly altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindu law of succession by modern writers and compilers; see 1 Strange's Hindu Law, 192; Colebrooke's Dig., Bk. v. It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible,—that in the case of an inheritance which is from its nature indivisible, and can, therefore, go to one only of several sons, the first-born, by reason of his general pre-eminence, should be preferred to his younger brother.

It was not disputed that this would be so in the case of several sons by the same mother; but it was contended that, where there were sons by different wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the sons of wives of the same caste and class. Thus Menu says:—"A younger son being born of a first marriage, after an elder son had been born of a wife last married, but of a lower class, it may be a doubt in that case how the division shall be made;" Ch. ix, s. 123.

The doubt thus suggested whether, even in the case of a wife of a lower class, there would be inequality of division amongst the sons, raises a strong presumption that there would be none where the mothers were of the same class. But the matter does not rest on presumption, for the 125th section runs thus:—"As between sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the

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mother; but the seniority ordained by law is according to birth."

It is true the writer is in this section treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest son is entitled, and one of them he had just declared in a preceding section (119) thus:—"Let them never divide the value of a single goat or sheep; a single goat or sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said that the single goat or sheep is to belong to one son, it is apparently for the same reason that a zemindari so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several sons is to be deemed the first-born is declared by s. 125 above cited; "there can be no seniority in right of the mother, but the seniority ordained by law is according to birth."

It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindu law upon the question, when regarded apart from any special custom prevailing in a particular district or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the son of the first wife would succeed before an elder brother by a subsequent wife, and it was contended that, by analogy, the son of the second wife must be entitled to the like precedence over the son of the third. There are, undoubtedly, authorities which show that the first wife occupies a position of honor and precedence above all others, but it is not necessary for their Lordships to decide whether the admission made in this case is in accordance with general Hindu law; for, supposing the law to be so, no just analogy can be established between the status of the first wife and that of any subsequent wife. Her title to special rank and privileges rests upon grounds peculiar to the first wife, and which can have no application to others. (See 1 Strange's Hindu Law, pp. 55 and 56.) The reasons upon which she alone of all the wives is entitled to peculiar

honor and privileges, rather point to the conclusion that the wives subsequently married, if of the same caste and class, are on an equal-footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favor of the right of the first-born son. The inheritances of Hindus which descend on a single heir, are almost entirely confined to zemindaris in the nature of a raj, and to offices; see Norton's Leading Cases, Pt. i, p. 278, and it is obviously in accordance with reason and convenience that such successions should devolve upon the son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion that, upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of Bombay in *Bhujangrav bin Dhavalatrav Ghorpade v. Malojirav bin Dhavalatrav Ghorpade* (1). Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of Madras and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Gregory & Co.*

Agents for the respondent: Messrs. *Williamson, Hill & Co.*

(1) 5 Bom. H. C. Rep., 161.

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Feby. 12

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Prescription—Light and Air—User.

The law of prescription applicable to India is the English law previous to the passing of the Prescription Act, 2 & 3 Will. IV, c. 71. In order to establish a right to light and air, an uninterrupted user of at least twenty years, with the acquiescence of the owner of the servient tenement, must be shown (1).

In a suit to restrain the defendants from obstructing the light and air through certain windows of a house belonging to the plaintiffs, it was shown that the enjoyment of the alleged right began on 14th April 1850, the windows then being in a sufficiently finished state to create the right. In March 1870 the plaintiffs received notice from the defendants of their intention to erect a building which would have the effect of obstructing the passage of light and air through the plaintiffs' windows. The building was actually commenced on 23rd March 1870, but it was not actually raised to such a height as to amount to an obstruction until some days after the twenty years had elapsed. *Held* that there was not an enjoyment for twenty years with the acquiescence of the defendants such as entitled the plaintiffs to maintain the suit.

Quære.—Whether proof of constructive knowledge on the part of the defendants would not be sufficient to show their acquiescence?

APPEAL from a decree of the High Court (Couch, C.J., and Markby, J.), dated 14th November 1870, reversing a decree of Norman, J., sitting as a Judge in the Ordinary Original Civil Jurisdiction of the High Court.

The suit was instituted on the 18th May 1870 to restrain the defendants, the now respondents, from building a wall, and to compel them to pull down a portion already built.

The following are the facts of the case:—The plaintiffs were the owners of a house wherein they carried on business as merchants, known as No. 40, Strand, Calcutta. The defendants

* *Present*:—THE RIGHT HON'BLE LORD JUSTICE JAMES, SIR B. PEACOCK, LORD JUSTICE MELLISH, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEL.

(1) But see now Act IX of 1871, Part iv..

were owners of a piece of ground adjoining the plaintiffs' house, three of the boundaries of the defendants' land being the Strand on the west, Clive Street on the east, and the plaintiffs' house on the south. The land so belonging to the defendants was, in 1849, and for many years subsequently, the property of one Raja Ramchunder, who lived at Moorshedabad, and never came to Calcutta until some time after 1853. During the time that the property belonged to the Raja, it was let out to tenants, and was used for storing chains, anchors, &c.

On the second storey of the plaintiffs' house there were seven windows on the north side, and the building of this storey was finished in May 1850.

About 1854, a small, mud-built, tiled hut, which stood on the south-west corner of the Raja's ground, was pulled down, and a brick-built messuage, used as a house for an idol, was erected in its place, and that building, which was about twenty-one feet in height, was placed exactly opposite four of the seven windows of the second storey of the house. In March 1870, the defendants being about to build a godown opposite the remaining windows, at the same distance from the plaintiffs' wall as the idol-house was, offered to place the godown further back if the plaintiffs would buy from them the piece of land to the extent which they would wish to be left between the proposed godown and the plaintiffs' house, and negotiations were accordingly entered into for that purchase, but they were broken off by a letter dated 2nd April 1870, written by the plaintiffs, to the respondents, in which they protested against any building being erected that might affect their legal rights as to light and air to their premises, or any attempt to erect any wall or building above the level of the bottom of their windows that overlooked the respondents' land.

The defendants having previously to this entered into a contract for the building of the new godown, and considering that the plaintiffs had no right to prevent them from so doing, proceeded with the building on a line with the idol-house. The building was actually commenced upon the 23rd March, but it was not until after the 8th May that it was high enough to obstruct the light.

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After some correspondence between the parties, the plaintiffs, on the 18th May 1870, filed their plaint to restrain the respondents from proceeding with such building, so as to obstruct the light and air from the three remaining windows of the seven windows above-mentioned, and an application by the plaintiffs for an interim injunction was granted on the 20th May. On the 15th June the case came on for hearing before Norman, J., who, on the 27th June, gave judgment in favor of the plaintiffs, holding that they had enjoyed the access of light to their windows for twenty years before the respondents' wall reached to the height of those windows (1). He fixed the date of 14th April 1850 as the date from which their right commenced, the windows being then in such an advanced state as to give them such a right.

On appeal by the defendants, Couch, C.J., and Markby, J. reversed that decision on the ground that no actual knowledge was shown on the part of the defendants (2).

From that decision the plaintiffs appealed to Her Majesty in Council.

Mr. *Kay*, Q.C., Mr. *Cowie*, Q.C., and Mr. *Doyne* for the appellants.

Mr. *Field*, Q.C., and Mr. *J. D. Bell* for the respondents.

The Counsel for the appellants went at considerable length into a consideration of the authorities relied upon by the Appellate Court, but it was pointed out by their Lordships that taking the 14th April 1850 as the commencement of the right, the real question was whether there had not been an interference with that right before the 13th April 1870. With regard to this it was argued that the actual obstruction did not take place until May; that there could have been no objection to the defendants' building up to a certain height, provided that they placed the roof on the new building below the line which would cause an obstruction; and there was no reason to suppose that, after the objections had been so forcibly pointed out by Messrs. *Gisborne & Co.*, when the building commenced, that if it was raised to a

(1) 6 B. L. R., 88.

(2) 6 B. L. R., 93.

certain height it would become an obstruction, the defendants would proceed further.

The Counsel for the respondents were not called upon.

Their LORDSHIPS gave the following judgment:—

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This was a suit for an injunction praying that the defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing light which the plaintiffs alleged they were entitled to have through their windows. It would appear that the windows in respect to which the right to the light is claimed were so far completed on the 14th April 1850 that the origin of the right would then accrue; that is the finding of Norman, J., the Judge of first instance,—a finding in which their Lordships concur.

The suit was commenced on the 18th of May 1870, rather more than a month beyond the expiration of twenty years from the former date of April 14th, 1850.

It is admitted that the Prescription Act, the 2nd and 3rd William IV, c. 71, does not apply, and that we must have resort to the English law which prevailed before its passing. So far as this would seem to be clear, that the plaintiffs, in order to establish their title, would have to show an uninterrupted user of at least twenty years, with the acquiescence of the defendant, the owner of the servient tenement. But some questions of nicety have been raised as to what would or would not amount to acquiescence, and it was discussed whether actual knowledge was necessary to be shown on the part of the defendants. That proof of such actual knowledge was necessary appears to have been the view of the Court above which reversed the decision of Norman, J., the Judge of first instance, and found, as a fact, that actual knowledge was not shown to have existed on the part of defendants. If the decision of the case rested upon this point their Lordships would have desired to hear further argument, because they are by no means satisfied that knowledge on the part of the agent, who acted for the Raja, the owner of the property in 1850 (from whom the defendants purchased), who collected his rents, and, further, was entrusted

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with the authority of fixing their amount, would not be constructive knowledge on the part of the Raja, sufficient to satisfy the exigence of proof on the part of the plaintiffs.

Another question arose in the case as to whether the fact of the premises being let to tenants at, as it would appear, a monthly rent, on the commencement of the accruing of this right, namely, in 1850, would have had any bearing upon the rights of the parties. But their Lordships do not think it necessary to enter into a discussion of these questions, because they have come to the conclusion, independently of them, that the plaintiffs have not established an uninterrupted user of these lights for the space of twenty years, with the acquiescence of the defendants. It must be taken that the enjoyment commenced on the 14th April 1850. It would appear that in March 1870 the plaintiffs received a notice from the defendants, or, at all events, they were informed by the defendants that it was their intention to erect a building of twenty-four feet or more in height on the north of the premises of the building in question, which would have the effect undoubtedly of obstructing their lights. It appears that that building was actually commenced on the 23rd March 1870, and its construction was continued. It is true that it was not raised to such a height as to actually amount to an obstruction until some days after the twenty years had elapsed; but it was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the twenty years.

Under these circumstances it appears to their Lordships that it is quite impossible to presume enjoyment for twenty years with the acquiescence of the owner of the servient tenement, when, before the expiration of those twenty years, the owner not merely gave notice of his intention to interfere with that enjoyment and to raise an obstruction, but in pursuance of that notice actually commenced the erection of that obstruction which was completed a few days after the expiration of the time in question.

Under these circumstances their Lordships have come to the conclusion that there was not an enjoyment for twenty years on the part of the plaintiffs with the acquiescence of the defendant such as to entitle them to maintain this suit.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Appellate Court, the High Court of Calcutta, be affirmed, and this appeal dismissed with costs.

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Appeal dismissed.

Agent for the appellants: Mr. Barrow.

Agents for the respondents: Messrs. Robert Oldershaw & Son.

PUDDOMONEE DOSSEE AND ANOTHER (HEIRS OF PLAINTIFF) v. ROY
MUTHOORANATH CHOWDHRY AND OTHERS (DEPENDANTS).

P. C.*
1873
May 10, 16.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Alienation pending Attachment in Execution.

Certain property was attached in execution of a decree, and while the attachment was in force pottas were granted to certain persons by the judgment-debtors. Twelve years after the attachment, no further steps having been taken in the matter, the execution case was struck off the file, and the property was afterwards mortgaged by the judgment-debtors to R. Subsequently a fresh attachment was issued at the instance of the heirs of the former attaching-creditor, under which the property was put up for sale subject to R's mortgage, and R herself became the purchaser. In a suit by R to set aside the pottas granted during the continuance of the first attachment, *Held* that the prohibition against alienation of property under attachment avoids such alienation only as against the execution-creditor or persons entitled to claim under him.

A conveyance executed by the judgment-debtor after an attachment has been removed, and before a fresh attachment is issued, is valid, though the second attachment is under the same execution as the first.

Quære.—Whether an alienation of property under attachment void as against the execution-creditor becomes valid by relation when the attachment is removed?

Sembla.—It may be presumed that an execution, long neglected and finally struck off, has ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain.

APPEAL from a decision of the High Court, dated 30th May 1863, reversing a decree of the Principal Sudder Ameen of the 24-Pergunnas, dated 12th July 1860.

* *Present* :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR MONTAGUE E. SMITH,
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The suit was brought by one Rassmonee Dossee for the cancelment of two pottas, both the lessors and lessees being made defendants. The property to which the pottas related was situated in Calcutta, and originally belonged to the Sirkars, the lessors. In 1832 it was attached in execution of a decree obtained in 1830 against them by one Bhôyrub Sen; but nothing having been done under the attachment, the execution case was struck off the file in 1844. In the following year, 1845, the Sirkars mortgaged the property to Rassmonee. In 1848 a new attachment issued at the instance of the heirs of Bhôyrub Sen, and in the following year the property was sold thereunder subject to Rassmonee's mortgage, and she herself became the purchaser. The pottas which were the subject of the suit were granted by the Sirkars to the Chowdhrys during the pendency of the first attachment; the first being a *bhag* (share) potta dated 17th April 1833, the effect of which was to create a partnership between the lessors and lessees in the profits of the lands; and the second being a *maurasi* potta dated 2nd October 1836.

In the present suit Rassmonee sought to set aside those pottas on the ground that they were made collusively for the purpose of defeating the creditors of the Sirkars, and further, that having been granted while the property was under attachment they were wholly void.

The Principal Sudder Ameen found that both pottas were collusive, but at the same time appears to have considered that the defendants had been in *bonâ fide* possession, and, having expended large sums on the property, were entitled to half the meane profits which had accrued during the time they held possession; and he made a decree accordingly. On appeal his decision was reversed by the High Court, and the plaintiff's suit dismissed on the ground that the documents had not been shown to be collusive, and that the defendants, the Chowdhrys, had held possession under them for a long time.

From this decision the present appellants, who were Rassmonee's heiresses, appealed to Her Majesty in Council.

Mr. Leith, Q.C., and Mr. J. Arathoon, for the appellants,

argued that the pottas were not proved to have been duly executed, or otherwise to be genuine instruments; and that the lands to which they referred were at the respective dates thereof under attachment in execution of the same decree under which the lands were subsequently sold. In reference to the old law of attachment, they referred to Regulation IV of 1793, s. 7, Regulation II of 1806, s. 5, cl. 2, Regulation XXVI of 1814, s. 15, explained as to cl. 8 by Regulation VII of 1825, s. 7. An attachment for sale becomes null and void on the execution case being struck off the file—*Gobindhun Singh v. Meer Muhsun Alee* (1). An alienation is null and void pending an attachment—*Pursun Ram v. Mohummud Tukee Khan* (2) and *Bulram Das v. Syud Mohummud Tukee Khan* (3). Such alienation is void against the attaching-creditor and those claiming under him—*Anandalal Das v. Radhamohan Shaw* (4) and *Ramcharan Lal v. Jhatu Sahu* (5). They also referred to *Mussamut*

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(1) S. D. A. (1855), 244.

(2) *Id.* (1848), 591, 592.

(3) *Id.* (1849), 202.

(4) 2 B. L. R., F. B., 49.

(5) *Before Sir R. Cough, Kt., Chief Justice, and Mr. Justice Kemp.*

The 3rd June 1870.

RAMCHARAN LAL AND ANOTHER
(PLAINTIFFS) v. JHATU SAHU AND
OTHERS (DEFENDANTS).*

*Alienation pending Attachment — Act
VIII of 1859, s. 240.*

Mr. C. Gregory for the appellants.

Baboo Mohini Mohun Roy for the respondents.

THE judgment of the Court was delivered by

Couch, C.J.—In this case the mort-

gage to the plaintiff was made on the 3rd of January 1863 while the attachment was subsisting. It is not necessary, I think, to give any opinion as to whether the striking off of the execution case in the manner which appears in the proceedings operated as a removal of the attachment or not. If it were necessary for us to determine that, I am strongly inclined to think that I should hold that it did not, but I abstain from giving any opinion upon that point. Then this mortgage being made whilst the attachment was subsisting. S. 240 of Act VIII of 1859, says that any alienation of the property attached, whether by sale, gift, or otherwise during the continuation of the attachment, shall be null and void. I think upon these words it is clear that the removal of the attachment would not operate so as to render an alienation made whilst the

* Special Appeal, No. 2994, against the decree of the Judge of Zilla Bhaugulpore, dated the 14th September 1869, reversing a decree of the Principal Sudder Ameen of that district, dated the 14th May 1866.

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Zahuran v. Tayler (1) and *Maharaja Dhiraj Mahatab Chand Bahadur v. Surnomoyee Dossee* (2).

None of the respondents appeared.

attachment was subsisting a valid one. It could not have such a retrospective effect. The alienation is said in s. 240 to be null and void; and if it is null and void, it cannot be validated by the removal of the attachment.

With regard to the argument derived from s. 245, if the decision of this Court in the case of *Anandalal Das v. Radhamohun Shaw* (a), which has been appealed against to the Privy Council, stands, s. 245 cannot apply, because if the alienation is only null and void as against the attaching-creditor, and he withdraws the attachment under s. 245, on the decree having been satisfied, there can be nobody to impeach the alienation. But if it should be held that the opinion of Markby, J., is the correct one, and that the alienation is null and void against everybody, there may possibly be some foundation for the argument based on s. 245. I am inclined to think that the circumstance that it would so operate (if Mr. Markby's construction is correct) is an argument against its being so, and that the construction put upon that section by the majority of the Court is the correct one. The decree of the lower Court must be affirmed with costs.

(1) 2 B. L. R., A. C., 86.

(2) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 2nd March 1871.

MAHARAJA DHIRAJ MAHATAB
CHAND BAHADUR (ONE OF THE
DEFENDANTS) v. SURNOMOYEE
DOSSEE (PLAINTIFF).*

Alienation pending Attachment.

Baboo *Chunder Madhub Ghose* and *Ashootosh Mookerjee* for the appellant.

Baboo *Romanath Bose* and *Taruck-nath Sein* for the respondent.

GLOVER, J.—The plaintiff in this suit obtained a decree on the 5th May 1863 against Sham Chand Baboo and his wife Joy Coomaree Beebee. The circumstances under which Joy Coomaree came into the suits are not very intelligible, but there is no necessity to enter into them, because there is no doubt that the decree was given both against husband and wife. In execution of this decree the plaintiff attached one of the properties which had originally belonged to Joy Coomaree, and on the 6th November 1865 obtained Rs. 1,500 on account of his decree and allowed the execution case to be struck off the file. In the interim, however, the defendant (special appellant before us), the Maharaja of Burdwan, got a conditional deed of sale from Sham Chand Baboo and his wife Joy Coomaree, which was eventually fore-

* Special Appeal, No. 1696, against the decree of the Officiating Judge of Zilla East Burdwan, dated the 12th May 1870, affirming a decree of the Subordinate Judge of that district, dated the 15th February 1870.

The judgment of their LORDSHIPS was delivered by

SIR J. COLVILLE.—The suit out of which this appeal has arisen was brought by the late Rassmonee Dossee, and her appeal

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closed, and a decree for possession obtained. After the Raja had so obtained possession, the original decree-holder took out execution again, and applied for attachment of the judgment-debtor's property. The Raja objected to the attachment, and his objection was allowed; hence the present suit by the plaintiff for a declaration that the property of which the Raja is in possession is liable for the unsatisfied portion of the plaintiff's decree of the 5th of May 1863. The defence of the Rajah is that as his *kat kabala* was registered, the decree obtained on it was entitled to take precedence of the decree of the plaintiff, and that although, when the *kat kabala* was executed, the property conveyed was under attachment, that attachment was very soon after allowed to drop and was ineffectual.

Both lower Courts decided in plaintiff's favor, and we think that they decided rightly. There can be no doubt that when the defendant's conditional deed of sale was executed, the property conveyed by that deed was under attachment, and no alienation could legally have been made by the judgment-debtor. The contention that the *kat kabala* became afterwards effectual, as against the judgment-debtor, by reason of the decree-holder's having allowed the attachment to lapse, is altogether untenable; no subsequent laches, supposing there to have been laches on the part of the decree-holder, could make valid what was in its inception

invalid. If the *kat kabala* was a document which could not have been legally given by the judgment-debtor at the time it was given, because that judgment-debtor had then no power to alienate, it was not afterwards made valid by the fact of the property being released from attachment; but we are by no means satisfied that the attachment ever did cease to exist. The lower Court has found as a fact that it continued, and the joint petitions of the judgment-debtor and decree-holder show, that when the execution case was struck off it was agreed upon by both parties that the attachment should be considered as subsisting. It is contended that inasmuch as the decree-holder subsequently made two several applications for attachment in 1868 and 1869, that of itself shows that the first attachment was abandoned. But it would not follow of necessity that, because subsequent applications for attachment were made, the original attachment was abandoned. The question was discussed at some length in the case of *Jhatu Sahu v. Baboo Ramcharan Lal (a)*. In that case the learned Judges gave detailed reasons for holding that the striking off of an execution case does not of necessity do away with an attachment once made, unless there is something to show that the attachment was expressly abandoned by the party at whose suit it was issued. If it could be shown in this case that the subsequent petitions by the judgment-creditor were to the effect that he had of

(a) 3 B. L. R., App., 68.

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has been continued by two ladies, who appear to be her heirs and representatives.

The suit was brought for the purpose of cancelling a *bhag* potta set up by the defendants, the Chowdhrys, and recovering from them the possession of a parcel of land upon which a bazar had been built, with mesne profits, the title on which Rassmonee Dossee sued being that of a purchaser at an execution-sale. That was the object of the suit as stated in the plaint. When the Chowdhrys put in their answer, they not only relied upon the *bhag* potta, but also set up the second, which we may call the *maurasi* potta; and the validity of that being called in question by the replication, one of the issues settled in the suit put in issue the validity of both pottas, being in terms whether they had been granted *bonâ fide* to the defendants, or whether they were collusive or illegal.

The title of Rassmonee Dossee to the right, title, and interest of the execution-debtors, a joint family which may be described as "the Sirkars," is not disputed; the only question is what were the extent and nature of their interest in the property sold at the date of the sale? It is necessary, however, in order to see how this question arose between the parties, to recapitulate, as shortly as may be, the facts of the case.

The proceedings go back as far as the year 1830. In August of that year one Bhôyrub Sen recovered a money decree for an inconsiderable sum against the Sirkars. In execution of that decree, the land in question was attached on the 27th February 1832, and the usual proclamation of attachment was issued on that occasion. Bhoyrub Sen died, leaving (as it is said, and their Lordships will assume correctly said) only minor heirs. Nothing further was done between the date of this attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. It

his own accord abandoned the first attachment and applied to have the property attached *de novo*, that would be a different thing, but there is nothing on the record to show the circumstances under which the subsequent applications were made, nor can

the pleader for the special appellant show us that the facts are as stated by him.

We see, therefore, no reason to interfere with the judgment of the Court below, and dismiss the special appeal with costs.

appears that within one year after that was done Rassmonee Dossee became mortgagee of the land under instruments executed by the Sirkars. There were two mortgages for Rs. 500 each. They seem to have been ordinary Bengali mortgages operating as mere pledges of the land; and she subsequently instituted proceedings to enforce those securities. Pending her suits, and, apparently, before she obtained a decree, the heirs of Bhoyrub Sen took fresh proceedings to enforce their judgment. A new attachment issued in June 1848. The order for sale was made on the 30th March 1849, and Rassmonee Dossee became the purchaser for a small sum, Rs. 1,400, of the property. This sale was founded upon the second attachment, to which objections were taken and disposed of before the order for sale. One-fifth of the property originally attached was released as not being subject to the attachment, on the objection of some of the Sirkars. Rassmonee Dossee also came in as an objector, alleging her mortgage interest, and the result of that was that by the *lotbandi* the property was put up expressly as subject to her mortgage. All, therefore, that she bought at the execution-sale was the equity of redemption remaining in the Sirkars subject to the mortgage to her. She then took proceedings to recover possession of the land; but she was met by the defendants, the Chowdhrys, who alleged that they held the land under pottas granted by the Sirkars. After this she seems to have slept upon her rights for seven or eight years, at the expiration of which period she commenced the present suit.

The title so set up by the Sirkars was of this kind. The commencement of it was alleged to be a *bhag* or share, potta, dated the 17th April 1833. From that instrument (which was afterwards produced to the High Court) it appears that the land was granted to them for the purpose of having a bazar erected upon it at their expense, the arrangement between the Sirkars who granted the land and their lessees being that the latter were to pay a 2-anna and 10-gunda share of the profits of the bazar, retaining 13 annas and 10 gundas for themselves. The duration of this tenure is, upon the face of the *bhag* potta, somewhat indefinite. It was evidently intended to be

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1878 of an hereditary character, because heirs are mentioned; but
 PUDDOMONEE there is a stipulation towards the end of the potta that if the
 DOSSEE lessees wished to give up the bazar they should be at liberty to
 v. do so, and that in that case the lessors would either purchase
 ROY the huts and other things incident to the bazar which had been
 MUTHOORA- erected on the land, or allow the lessees to dispose of them else-
 NATH where. And there is also a stipulation that if the lessors wished
 CHOWDHRY. to transfer their right in the land they would give the lessees
 information of their intention to do so, and would give the latter
 a right of pre-emption.

The case of the respondents, however, goes further than this. They allege that on the 2nd October 1836, the Sirkars executed to them a permanent *maurasi* potta, which materially altered the relation of landlord and tenant. The effect of that was to give them in terms a perpetual *maurasi* potta, in consideration of a salami of Rs. 1,000 and a reserved rent of Rs. 600 per annum, commuting the share of the profits to which the lessors had been previously entitled for that rent of Rs. 600. This is the second of the deeds of which the validity is in question in this suit. I have not alluded to a third deed, which appears to have come out in the course of the proceedings, and to have been first produced in the High Court, because it was only a second *bhag* potta, which does not appear to relate to the property in question in this suit, but rather, as their Lordships understand it, to the one-fifth of the land which had been released from the execution. It was in nearly the same terms as the original *bhag* potta, and there is no issue directed to try the validity of that deed in this suit.

That being the state of the case, the two principal questions which have been argued upon this appeal, are, first, whether, as represented by the plaintiff, these deeds, or either of them, were or was fraudulent and collusive; and a contrivance between the Sirkars and the Chowdhrys to defeat the creditors of the former, or whether they were *bonâ fide* documents; and secondly, whether, if admitted to have been *bonâ fide* conveyances, they are not void as against Rassmonee Dossee by reason of their having been executed whilst the first attachment was still subsisting and in force?

Their Lordships propose to deal with the first of these questions in the first instance, and without going at length into the evidence. The Principal Sudder Ameen seems to have found that the first *bhag* potta had not been formally or properly proved before him. He also thought that the second potta was a collusive document, and had not been proved to be a genuine one; but he seems to have admitted, by the very form of his judgment, that in some way or other the respondents had been *bonâ fide* in possession of the property; that they had, under and by virtue of the arrangements (whatever they may have been) which subsisted between them and the Sirkars, laid out large sums in establishing this bazar; and that by reason of that expenditure they were entitled to be allowed one-half of the wasilat, or mesne profits, of which Rassmonee Dossee, by her suit, had claimed the whole.

The High Court, on the other hand, has found that both the documents must be taken to be genuine, or at least that they had not been shown to be collusive documents, and that the long possession of the respondents had been held under them and by virtue of the title which they conferred, and that the suit ought to be dismissed.

Their Lordships, upon the evidence, cannot feel any doubt but that under the share-potta there has been a *bonâ fide* possession during many years on the part of the respondents. The possession in fact, they think, cannot be disputed. There is nothing to which they can attribute it, except the title commencing with that document. They therefore do not quarrel with the finding of the High Court upon that point.

Then, as to the second *maurasi* potta, the objections seem to be, first, the inadequacy of the consideration stated; and secondly, that, although in the course of the proceedings in the suit of Ramruttun Roy, the *bhag* potta was there put forward and apparently proved, no mention was made of this second or *maurasi* potta. Their Lordships do not deny that these circumstances cast some suspicion upon this document. On the other hand, looking to the whole of the *res gesta*, and to the statement made by the Sirkars on the occasion of the revenue settlement to the effect that the Chowdhrys were in possession

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under a permanent *maurasi* tenure, their Lordships do not feel at liberty to say that the finding of the High Court in favor of the second potta was wrong, or one which they would be justified in now disturbing. There was certainly evidence upon which the Court might come to that conclusion. Besides the evidence of one of the subscribing witnesses, there was that of two other witnesses, of whom one was a member of the family of the Sirkars. No doubt the Judge of first instance was not disposed to act upon this testimony. On the other hand, the High Court finding it corroborated by the circumstances to which I have referred have accepted it as true. Their Lordships cannot say that they were wrong in so doing. If the *maurasi* potta were executed when it bears date, the whole of the respondents' title was completed before the grant of the plaintiffs' mortgage, and when there was no adequate motive for the commission of a fraud. If, on the other hand, this document were concocted at a later date, and to defeat the plaintiffs' claim (of which there is no proof), the parties would hardly have assigned to it a date which exposes it to the objection next to be considered.

That objection is whether, supposing the documents to be neither fraudulent nor collusive, they were void as against Rassamonee Dossee, by reason of the date at which they were executed, *viz.*, whilst the first attachment was subsisting.

On that point we have been referred to a great many authorities, and it may be admitted that there is some difficulty in reconciling all the cases on the construction of the prohibition against alienation which is involved in an attachment under the new procedure, and seems to have been equally involved in an attachment according to the old procedure. But it appears to their Lordships that one point at least has now been conclusively settled, *viz.*, that the prohibition against alienation avoids the conveyance only as against the execution-creditor, or some person entitled to claim under him.

Again, it follows from the first case, which was cited by Mr. Leith—*Gobindhun Singh v. Meer Muhsun Alee* (1)—as in fact he admitted, that, if an attachment has been permanently struck

(1) S. D. A., 1855, 244.

off, and a new attachment has become necessary, a conveyance which is executed by the judgment-debtor between the two attachments will be valid. And one result of that rule, when applied to the present case, is that the conveyances by which Rassmonee Dossee acquired her interest as mortgagee must be taken to have been valid, notwithstanding the old attachment which had been issued in 1832.

It may, however, be argued that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution-creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case Rassmonee Dossee cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result of that was that the property was put up for sale as subject to her mortgage. She therefore bought only the equity of redemption, and presumably paid a smaller price than the property would have realized, if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, *viz.*, the whole property free from mortgage, but the mere equity of redemption. She cannot be allowed to say that the original attachment ceased to be operative, so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have been binding between the Sirkars, the judgment-debtors from whom she took her mortgage, and the respondents in this case, if there had been an end of the execution altogether.

Their Lordships moreover are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment-creditor, or any person claiming under him, to say that conveyances executed pending the first attach-

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ment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in India the striking an execution-proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

Their Lordships desire to add that the extraordinary and unexplained delay which has taken place in the conduct of this suit would have increased their regret at finding themselves compelled, if they had been compelled, to give way to the objection that these instruments were null and void by reason of the date at which they were executed. The effect of allowing this appeal would be to disturb a possession, now found to be a *bonâ fide* possession, which has endured for forty years. For much of this delay Rassmonee Dossee and the appellants are responsible. It has been stated that seven years elapsed between the first assertion of the respondents' title and the institution of the suit, and it appears that this appeal had been some ten years in the country before it was brought to a hearing.

For the reasons above stated their Lordships have come to the conclusion that it is their duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal. As it has been heard *ex parte* there will be no order as to costs.

Appeal dismissed.

Agents for the appellants: Messrs. J. H. and H. R. Henderson.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

DE SOUZA v. THE SECRETARY OF STATE FOR INDIA IN
COUNCIL.

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Derivative Executor—Indian Succession Act (X of 1865).

Under the Indian Succession Act, the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866.

LAWRENCE DE SOUZA died in 1853, leaving a will, by which he appointed Lawrence Augustus De Souza his executor, who proved the will in 1853. L. A. De Souza died in September 1871, leaving a will dated in 1860, and two codicils dated respectively September 1865 and February 1870. By the last codicil he appointed the plaintiff his executor, who obtained probate of the will and codicils on the 6th of December 1871.

L. A. De Souza died possessed of certain pieces of Government paper which he held as executor of L. De Souza, to whose estate they appertained.

On the death of L. A. De Souza, these papers passed into the hands of the plaintiff, who drew interest upon them, and otherwise dealt with them as derivative executor of L. De Souza. The Government for some little time recognized his title as derivative executor; and two of the papers were actually issued in the name of the plaintiff as derivative executor of L. De Souza. Subsequently, in the end of 1872 or beginning of 1873, the Government declined to recognize the plaintiff as the derivative executor of L. De Souza; and calling attention to the change in the law which had been effected by the Succession Act, informed the plaintiff that they could not recognize him as representing the estate of the original testator, unless he obtained special administration to his estate. The plaintiff thereupon brought this suit to recover interest accrued due on the paper.

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Mr. *Evans* for the plaintiff.

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The *Advocate-General*, offg. (Mr. *Paul*) and the *Standing Counsel* (Mr. *Kennedy*) for the defendant.

Mr. *Evans*.—The words in s. 2 of the Indian Succession Act that the rules therein contained “shall constitute the law of British India applicable to all cases of intestate or testamentary succession” cannot be construed to mean the whole law of British India. According to the ordinary construction of Statutes and by the first words of the section itself, the old law, not expressly repealed by the Act, is to remain in force unless repugnant to the provisions of the new law. The definition of an executor in s. 3 of the Succession Act, *i.e.*, a person appointed by the testator to execute his will, is identical with the definition of the English text-books, except that the limitation of his power as to personalty is abolished: yet it was always admitted in England, and, till the present case, was also admitted in India, that, where an executor died, having in his hands unadministered assets of his testator, the executor of such executor could deal with such assets without making himself an executor *de son tort*. S. 181 is precisely the same as the English law; yet that law did not require the derivative executor to take out probate of the original testator’s will. S. 187 enacts that the Courts shall not recognize the executor unless he takes out probate; it is identical with the English law; but the executor derives his authority from the will, and not from probate: and in the present case the wills of L. De Souza and L. A. De Souza have both been proved. Under s. 193, letters of administration may be granted to a stranger without citing executors who have not proved the will; and under s. 196 a universal or residuary legatee may be admitted to prove the will in case an executor, who has obtained probate, dies before having fully administered the estate: but neither of these sections declare that the non-proving, or the derivative, executor is not a rightful executor. They may prove the will before these sections are put into force, and would then have the full powers of a representative duly appointed. Under s. 229 a new representative “may be appointed” where a proving executor dies leaving part of the testator’s estate

unadministered; and, no doubt, if an application had been made for the appointment of a representative, the Court would have been bound to read the word "may" as imperative: but in the present instance no such application has been made, and till then the derivative executor here as in England has full power to deal with the estate of the original testator. He cannot but deal in some way with the assets of that estate; for in any case he must separate those assets from the estate of his own testator.

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The *Advocate-General* for the defendant.—The Succession Act must be construed as a whole, and if so construed there is no ground for the position that the executor of an executor is derivative executor of the original testator. By s. 2, the Act is to constitute the whole law of India on the subject of testamentary or intestate succession, except so far as is otherwise provided by statutory law, for that is the clear meaning of the introductory words "except as provided by this Act, or by any other law for the time being in force." From the definition of a will in s. 3, and the declaration of capacity to make one in s. 46, it is evident that a person by his will can only dispose of his own property. And s. 179 clearly shows that the only property which vests in the executor is that of his own testator. S. 196 again is only consistent with the hypothesis that the first chain of representation has been broken: since the executor under the Act had no power, except with respect to the estate of his own testator, it became necessary to provide for the case of an executor dying without having fully administered his testator's estate,—that was done by s. 196. S. 229 is a total innovation on the English law, and in the clearest language sweeps away the doctrine of derivative executorship. [MACPHERSON, J.—Does the Succession Act apply where the will of the original testator was made before the Act came into force?] The plaintiff claims not under the will of L. De Souza, but under the codicil to the will of L. A. De Souza. That codicil was made in 1870; the plaintiff therefore cannot avail himself of s. 331. The Act consists of two distinct portions, relating respectively to procedure and to substantive law, and even if the latter

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portion be held not to apply in this case, the rules of procedure provided by the Act are applicable—*In re Kokya Dine* (1).

The *Standing Counsel* on the same side.—The words “testamentary or intestate succession” have been appropriated throughout the Act to succession under a will or on intestacy only. The reason why the derivative executor originally took was because he was the *hæres factus*, the absolute owner of the property. But a long course of decisions has cut down that proprietary right. The difficulty which the executor of an executor may find in ascertaining the assets of his own testator, without meddling with those of the original testator, occurs equally in the case of an administrator, yet the latter was never allowed to meddle with the unadministered assets of the original testator.

Mr. *Evans* in reply.—Under s. 179 property vested in a deceased person as executor vests in his executor. One of the incidents of the executorship created by the original testator was that the executor of the executor might deal with the unadministered assets: if the contention of the defendant be correct, the Act will interfere with a will made before 1853. But even if it be held that the plaintiff claims by virtue of the codicil to L. A. De Souza’s will, yet as the codicil and will formed only one instrument (see 1 Wm’s. Exors., 7th edit., 8), it would be difficult to say what the date of the whole instrument would be, and it might therefore be said that there was an interference with the latter will which was made in 1860.

Cur. adv. vult.

MACPHERSON, J.—The only point on which the parties ask for my decision is as to whether, since the Indian Succession Act came into force, there can be a derivative executor,—whether the executor of an executor is now, in India, the derivative executor of the latter’s testator?

(*The learned Judge, after stating the facts as above, continued.*)
—The plaintiff does not in the present suit claim any special

(1) 2 B. L. R., A. C., 79.

advantage from the fact that the Government did in the first instance accept his title as derivative executor and deal with him as such. As I have said, the only question at present before me is whether the executor of an executor is, as the law now stands, derivative executor of the latter's testator?

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I have no doubt that he is not; and I consider it to be clear that the law on the subject was entirely altered by the passing of the Indian Succession Act.

The matter depends chiefly upon ss. 2, 196, and 229 of the Succession Act. S. 2 says:—"Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession." This shows clearly that we are no longer to look to what is or was the English law, but that, subject to the exception in this section, we must look to the Act itself, and to the Act alone, for the law of British India applicable to all cases of testamentary or intestate succession. In my opinion, an enactment that the law contained in the Act shall constitute the law of the country applicable to all cases of succession, operates as a repeal of the previously existing law just as completely and effectually as if it had been expressly repealed. I take it therefore that, as a derivative executor is in no way alluded to in the Succession Act, he could have no existence under the Act, even if no provision had been made by the Act for filling up the representation in such cases. But provision is in fact made by the Act for supplying a new representative on the death of the executor.

S. 196 declares that, when an "executor dies after having proved the will, but before he has administered all the estate of the deceased, a universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered;" and s. 229 is as follows:—"If the executor to whom probate has been granted have died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate."

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It is said that the use of the word "may" shows that these sections are merely permissive, and that it was not intended to lay down that in every case fresh letters of administration must be taken out. But the usual rule in such cases is to treat the word "may" as directory and as showing the course which the Legislature intends shall be adopted. Moreover, if it be supposed that there can still be a derivative executor, what would be his position if "a universal or residuary legatee" were to come in and claim administration as authorized by s. 196? Is there to be a contest between the claimant and the derivative executor? In such a contest the derivative executor must necessarily go to the wall, for he is not a person to whom an original grant of administration could have been made, and s. 230 enacts:—"In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made."

This section (230) affords a further argument against the possibility of there being now such a thing as derivative executorship. For when we find the Legislature expressly declaring that "in granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made," how can we presume that there was any intention to have the estate ever vested in a person to whom an original grant could not have been made? Altogether, it is evident that existence of a derivative executor is not contemplated by the Act, and that the representation is treated as coming to an end on the death of the executor.

S. 179 has been referred to in argument. It declares that the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased vests in him as such. It is argued that, under this section, property vested in the deceased as executor vests in his executor. But I think that, reading the whole Act, it must be construed as meaning only the actual property of the deceased, whether held

by him for his own benefit, or the benefit of others, and not as meaning property vested in him as executor or administrator under the Succession Act. On the construction I put on the Act, upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of letters. This may possibly cause inconvenience and expense to the estate; but nevertheless it seems to be the law.

I was at one time inclined to think that in this particular case the plaintiff (as Lawrence De Souza's will was made long prior to 1866) might perhaps be protected by s. 331, which says that the provisions of the Succession Act shall not apply to any will made before January 1866. But the codicil under which the plaintiff claims as executor of Lawrence Augustus is subsequent to that year. And on further consideration, it appears to me that the plaintiff, being an executor under the Succession Act, can have no larger or other rights as such executor than any other person who obtains probate under that Act; or in other words that, as a person ordinarily cannot become derivative executor under the Succession Act, so he cannot become derivative executor under it, merely because the original testator died before 1866. I admit that this result may in one sense affect the estate of Lawrence De Souza. But it does not affect his will, or the construction to be put upon it; and therefore, in deciding as I do, I do not apply the Succession Act to Lawrence De Souza's will, within the meaning of s. 331.

The suit will be dismissed without costs.

Suit dismissed.

Attorney for the plaintiff: Mr. Hatch.

Attorney for the defendant: The Government Solicitor (Mr. Knowles).

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RAJA BISHEN PERKASH NARAIN SINGH (PLAINTIFF) v. BAWA
MISSER AND OTHERS (DEFENDANTS).*

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Mithila Law—Alienation—Self-acquired Property.

According to Mithila law, the owner of self-acquired property has full power of disposition over it.

APPEAL from a decision of the High Court. (Kemp and E. Jackson, JJ.), dated the 21st August 1868, reversing a decision of the Principal Sudder Ameen of Tirhoot, dated the 7th August 1866.

The plaintiff, who was an execution-creditor of the defendant Bawa Misser (one of the respondents), sued to set aside a deed of partition executed on the 5th February 1864, shortly before his death, by Dabee Dutt, father of Bawa Misser, and grandfather of the other defendants, who were minors. Though styled in the body of the instrument a deed of partition, it was in effect a deed of gift, disposing of the donor's ancestral property in favor of his son, and of his self-acquired property, which formed the bulk of his estate, in favor of his minor grandsons and his second widow, of whom he appointed his son Bawa Misser to be the guardian.

The plaintiff alleged the deed to be collusive, and in fraud of his execution rights against Bawa Misser. On 27th May 1865, the Principal Sudder Ameen allowed an objection to an execution-sale of property comprised within the deed, and this suit was accordingly instituted to try the question of its validity.

On the 7th August 1866, the suit was dismissed by the Principal Sudder Ameen as barred by limitation under s. 246 of the Civil Procedure Code. On the merits the Principal Sudder Ameen held that the property in suit was the self-

* *Present*:—SIR JAMES W. COLVILLE, SIR B. PEACOCK, SIR MONTAGUE E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

acquired property of Dabee Dutt; and on this point there was no appeal. He also held that, according to Mithila law, a father, although he may make an unequal partition of his self-acquired property among his sons, cannot wholly deprive an only son, and leave all his self-acquisitions to his grandchildren, who are not his Heirs. He cancelled the deed as a device to defeat creditors.

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On appeal the High Court reversed this decree, holding that the deed was a testamentary disposition, which Dabee Dutt had a right to make, and that there was no evidence that it was in fraud of his son's creditors. By the High Court, however, the case was treated as one to be governed by the Mitakshara law.

From this decision the plaintiff now appealed to Her Majesty in Council.

Mr. Cowie, Q.C., and Mr. Doyne, for the appellant, contended, that Dabee Dutt had no power to make the deed in question; that neither under Mithila nor Mitakshara law, could a father disinherit an only son in respect of self-acquired property by means of a partition or other alienation to his prejudice.

Mr. Leith, Q.C., and Mr. J. Arathoon, for the respondents, were not called upon.

The judgment of their LORDSHIPS was delivered by

SIR R. P. COLLIER.—The facts of this case, and the law which arises upon them, may be very shortly stated. Dabee Dutt Misser, shortly before his death, executed an instrument, whereby he gave to his only son, who was considerably in debt at that time, his ancestral property. His self-acquired property he gave to his grandsons, and to his then second wife, afterwards his second widow. At the same time he made his son the guardian of these grandsons during their minority. It was contended in the first place that he had no right to make this disposition of his property; and secondly, that this deed was fraudulent,—the intention of Dabee Dutt being that, although upon the face of the deed the property was given to the grandsons, it should really belong to the son, and that the transaction was not a real but a colorable one.

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The Principal Sudder Ameen appears to have adopted this view, but their Lordships are of opinion that there was no sufficient evidence to support it. The only evidence at all pointing in the direction of that finding, would be that, after the death of Dabee Dutt, the son remained in possession of the property, but inasmuch as the grandsons were minors and he was appointed their guardian, that possession was not inconsistent with the deed.

The High Court reversed the decision of the Principal Sudder Ameen, finding that the transaction was a real one, and not merely a colorable one—a finding in which their Lordships concur.

It only remains, then, to be decided whether or not by law Dabee Dutt was enabled to make this disposition of his property. The transaction occurred within the Mithila district, and the Mithila law would prevail. Of that law the principal authority is the Vivada Chintamani, in which it is laid down in very plain terms, without qualification, that “self-acquired property can be given by its owner at his pleasure” (1); and subsequently it is stated, that “the father has full dominion over the property of his father, which, being seized, is recovered by his own exertions, or over that which is gained by him through skill, valour, or the like. He may give it away at his pleasure, or he may distribute it” (2). In their Lordships’ view this dictum would apply.

But it has been argued that, under the Mitakshara law, the father could not dispose of the property away from his son without the son’s consent. The Mitakshara law appears to be referred to undoubtedly by the learned Judges of the High Court as applying to this case. But assuming, what it is not necessary to decide, that the Mitakshara law applied, and assuming the Mitakshara law only to admit of the father making such a disposition with the consent of his son, in this case the consent of the son was given. It was, indeed, argued that because the son was in debt he could not consent, but their Lordships are of opinion that there is no foundation for that

(1) Vivada Chintamani, by Prosonno Coomar Tagore, p. 76.

(2) *Id.*, p. 220.

argument. The consent of the son was given, and in either view Dabee Dutt exercised a power which by law appertained to him.

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On these grounds their Lordships are of opinion that the decision of the Court in India was right, and that this appeal must be dismissed with costs, and will humbly advise Her Majesty to this effect.

Appeal dismissed.

Agent for the appellant: Mr. Barrow.

Agent for the respondents: Mr. Wilson.

RAMANUGRA NARAIN (PLAINTIFF) v. MAHASUNDUR
KUNWAR (ONE OF THE DEFENDANTS).

P. C.*
1873
June 21 & 27.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Res Judicata—Deed of Gift—Fraud.

A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.

Quære.—Whether a donor can avoid his own deed on the ground of his own fraud?

APPEAL from a decision of the High Court (Bayley and Macpherson, JJ.), dated the 16th June 1868, affirming a decision of the Principal Sudder Ameen of Gya, dated 7th April 1868.

On the 28th August 1860, the respondent executed two deeds of gift in favor of her two daughters, one of them being the appellant's wife. This daughter, named Mussamut Geer

* *Present* :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

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Kunwar, died in 1864, leaving a son, who survived her a few days; and the appellant thereupon claimed a moiety of the nine mauzas in Pergunna Puchroophee, in Gya (subject of the deeds of gift), partly as heir to such son, partly in his right as husband.

Certain judgment-creditors of the respondent in 1862 and 1864 attached the mauzas comprised in the deeds; and two of them, viz., Bishenloll and Ramsurrun Sahu, subsequently obtained judgments to the effect that the deeds of gift were collusive and fictitious as against creditors. The plaintiff had intervened, and was made a party in Bishenloll's suit.

On the 23rd April 1866, the appellant sued in the Court of the Principal Sudder Ameen of Zilla Gya to recover possession from the respondent of a moiety of nine mauzas (being the subject of his wife's deed of gift). His wife's sister (donee of the other moiety), some defaulting tenants, and Ramsurrun Sahu were joined with the respondent as party defendants. The contention in the suit as between the appellant and the respondent appeared upon the face of the pleadings to be, that the appellant claimed an absolute title and possession of the property comprised in the deed of gift, while the respondent answered that the deed of gift was in the nature of a will executed with the intention that she should enjoy the property for her life, and her daughter in reversion after her death.

Meanwhile, Bishenloll's suit had on appeal been remanded for re-trial, and the two suits were heard together. The Principal Sudder Ameen on the 19th September 1866 decided in favor of the appellant, and of the due execution of the deed of gift. Thereupon both the respondent and Bishenloll appealed; a second remand of Bishenloll's suit followed; and on the 7th April 1868 the Principal Sudder Ameen found in that suit that the deed of gift was a fictitious one, executed with a view to defraud the creditors of the respondent.

The High Court on appeal upheld this finding, and in consequence decreed Bishenloll's suit in his favor, and dismissed the appellant's suit, not merely as against Ramsurrun Sahu, but absolutely.

There was no appeal from the decree in Bishenloll's suit.

The decree in the appellant's case was based upon the following passage in the judgment of Macpherson, J.:—

"The whole transaction having been one entered into for a fraudulent purpose, I do not think that Ramanugra Narain is entitled to a decree, even as against Mahasundur, for the daughters were parties to the fraud."

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The plaintiff appealed to Her Majesty in Council.

The question in appeal was what was the true effect of the deed as between the appellant and respondent, having regard to the fraudulent nature of the transaction as against third parties.

Mr. *Leith*, Q.C., and Mr. *Bell*, for the appellant, contended that the decree ought to have established the deed as against Mahasundur declaring at the same time that it was no bar to the sale of the property comprised therein at the instance of her creditors, if the deed were executed to their prejudice. They further submitted that there was no evidence in this suit of fraud, or if there were, of the daughter's participation therein. Assuming the deed to have been fraudulent and void as against creditors, the respondent was not at liberty to avoid her own deed on the ground of her own fraud; *Doe d. Roberts v. Roberts* (1) and *Hayes v. Leader* (2); a deed void as against purchasers and creditors may be good as against the parties. Moreover, the respondent admitted (and the admission was binding as against her) that the true intention of the deed was that although she was to take for life, at least the daughter was to take absolutely at her death. The learned Counsel also contended that there was no evidence of this life-estate, and that a deed of gift, followed by possession of the donee, operated under Hindu law as a conveyance.

Mr. *Cave*, for the respondent, contended that there was no evidence of any intention on the part of the mother to give any beneficial interest to the daughter; and that the deed had not been followed by possession. Assuming that there was fraud against creditors, that was inconsistent with a real transfer, and explained the intention of the parties. Fraud is a good defence

(1) 2 B. & A., 367.

(2) Cro. Jac., 270.

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even as between the parties to a deed; see *Collins v. Blantern* (1) and *Bowes v. Foster* (2), where the defendant was not precluded from showing that the transaction was not a real but pretended sale. The respondent did not set up a case of fraud, but the real intention with which the deed was executed, which was partially adverse to the terms of it; the appellant set up the case of fraud in order to defeat that intention. Undue influence was exerted over the respondent as a *pardanashin*; she was not therefore *in pari delicto* with the other parties to the transaction.

Mr. *Leith* replied.

The judgment of their LORDSHIPS was delivered by

SIR R. P. COLLIER.—The suit out of which the present appeal arises was brought under these circumstances:—

A widow lady, named Mahasundur Kunwar, had two daughters, both married; and on the 28th August 1860 she executed two deeds conveying to them in equal moieties, immediately and absolutely, certain nine mauzas, of which she must be assumed to have had the power of absolutely disposing.

In the year 1864, Geer, one of her daughters, died, leaving an infant son, who survived her three days; whereupon her husband, the present plaintiff, brings this suit for the purpose of recovering possession of Geer's share of one-half of the nine mauzas so conveyed by Mahasundur. Mahasundur's main defence, which it becomes most material to consider, is thus stated by her:—"With a view of preventing disputes in future amongst her two daughters, she executed a deed of gift in the nature of a will, with this intention, that she should remain in possession during her life, and after her death her daughters would be entitled." The plaintiff, undoubtedly, proved a *prima facie* case. He showed the execution of the deed conveying the half of the property to his late wife; he showed that the name of his late wife was substituted for that of Mahasundur on Mahasundur's own

(1) 1 Sm. L. C., 6th edit., 323, & see 355.

(2) 2 H. & N., 779.

application, and that an *amalnama* was shortly afterwards executed by Mahasundur, wherein she required the tenants to pay rents to her daughter, and he gave evidence that the daughter (his wife) had remained in possession of these mauzas during her life, although it appeared that after her death, by some means or other, Mahasundur had resumed possession of them. This case was answered on the part of Mahasundur in this way. She called several witnesses to prove that at the time of the execution of the deeds there was a verbal arrangement that they should operate only as a conveyance of the property after her death; and that, during her life, her daughters were to retain her property in trust or, as it is sometimes called, *benami* for her. Evidence was given that the plaintiff himself, Ramanugra, the husband of the other daughter Bhowanee, and Jeetun Lall, the father of the plaintiff, were parties to this transaction, and indeed the prime movers in it; and it may be observed that neither the plaintiff nor Jeetun Lall, his father, was called upon the part of the plaintiffs to contradict this. Some evidence was given on the part of Mahasundur that she actually received the rents; and it was argued, undoubtedly with great force, that it was extremely improbable that she should without apparently any consideration denude herself absolutely for her life of the bulk of her property. Such was the nature of the issues and of the proof as between the parties in this cause.

But the case is complicated in this way: one Bishenloll, a creditor of Mahasundur, instituted a suit against Mahasundur, to which the present plaintiff became a party by intervention, for the purpose of setting aside the deeds in question, on the ground that they were fraudulent as against creditors. Both cases were tried together, and one judgment was delivered in both. The substance of the judgment is that these deeds were altogether colorable, being intended to have no operation whatever, and that they were fraudulent as against creditors. On this ground a decree was given for Bishenloll in his suit, and for the defendants in the present suit. There is no appeal against the decision in Bishenloll's suit, therefore the judgment in that case cannot now be disputed. But the judgment

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in that case operates as no estoppel in the present, wherein the parties are not the same, and in their Lordships' opinion the same issue is not involved in the two suits. In Bishenloll's suit the issue was fraud or no fraud against the creditors. In the present suit the defendant does not set up that defence against the plaintiff. She does not allege the deed to be altogether void or inoperative, but her case is that it was intended to be operative so far as to convey the property after her death, and that there was, at the time of its execution, an agreement that for her life she was to have the beneficial interest, and her daughters were to hold *benami* for her. Their Lordships upon the facts find that the defendant Mahasundur has made out this issue, and therefore they are unable to concur in the judgment of the High Court, which finds that the deed was altogether fraudulent and colorable, and not intended to have any operation. Mahasundur does not set that up, and it would be a serious question if she did, whether she could be allowed to avoid her own deed on the ground of her own fraud. The plaintiff does not either set up any such case as that the deed was fraudulent, and that therefore Mahasundur was estopped from disputing it. In their Lordships' opinion, as between the present parties to the suit, the issue does not arise as to whether the deed was fraudulent as against the creditors, nor whether it was absolutely colorable and void.

Entertaining this view, their Lordships are of opinion that the finding of the High Court was wrong in as far as it decided that the deed was altogether inoperative. They think the High Court was right in determining that the plaintiff was not entitled to maintain this suit, as far as it related to the present possession of the property; but they are also of opinion that he is entitled to a declaration that his wife had, and that he, as the heir of his wife through his infant son, has the right to a vested remainder upon the death of Mahasundur, and that he is entitled to have his name substituted for that of his wife upon the register.

They will, therefore, humbly advise Her Majesty that the decree of the High Court and also the decrees of the Principal Sudder Amteu be reversed; that it be declared that the appel-

lant, as heir-at-law of his infant son, is entitled to the interest of his late wife, Mussamut Geer Kunwar, under the deed of gift executed in her favor by the respondent on the 28th August 1860, and to have his name substituted for hers upon the register; that it be further declared, as between parties to this suit, that, by virtue of the arrangement between them, Mussamut Geer Kunwar was entitled to the property comprised in the deed, but subject to the life-interest of the respondent; that it be declared accordingly that the appellant is not entitled to the possession of the property or the receipt of the rents during the respondent's lifetime.

Their Lordships are of opinion that each party should bear his own costs in this appeal.

Appeal allowed.

Agent for the appellant: Mr. *Wilson*.

Agents for the respondents: Messrs. *Watkins* and *Lattey*.

DULI CHAND (PLAINTIFF) v. MEHER CHAND SAHU AND OTHERS
(DEFENDANTS).

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1872
Nov. 20.

[On Appeal from the High Court of Judicature at Fort William in Bengal]

*Suit for Cancellation of Lease—Forfeiture—Act X of 1859, s. 23, cl. 5,
and s. 78.*

Where in a perpetual lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void: *Held* that in a suit under cl. 5, s. 23 of Act X of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of s. 78, even though the defence set up was false in fact.

APPEAL from a decision of the High Court (Norman and Seton-Karr, JJ.), dated the 10th May 1867, modifying a decision of the Deputy Collector of Patna. The suit was

* *Present*:—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PEACOCK,
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brought in June 1866, under s. 23 of Act X of 1859, to recover arrears of rent and for cancellation of a *mukarrari* lease dated August 1848, on account of a breach of a condition therein, that the lease should be void if six instalments of rent were allowed to fall into arrear. The plaintiff alleged that seventeen instalments were due under the lease.

The defendants set up in defence that they had paid the greater portion of the arrears, and that only a small sum remained unpaid, and that they had been turned out of possession by a third person to whom they had mortgaged their interest in the property in respect of which rent was sought in the present suit, and who had foreclosed.

The Collector was of opinion that this defence was a false one, and gave the plaintiff a decree for arrears of rent, but he considered the claim to cancel the lease barred by limitation.

The High Court on appeal confirmed the decision of the lower Court, as far as it gave a decree to the plaintiff for the arrears of rent, but held that the claim of the plaintiff to cancel the lease was not barred by the law of limitation. The Court was proceeding to give the plaintiff the whole relief sought, but an application appears to have been made on behalf of the defendants claiming the benefit of s. 78 of Act X of 1859, which entitled them, on paying the amount decreed within fifteen days, to be continued in possession of the *mukarrari* tenure. After hearing argument on the point, the Court held that the defendants were entitled to the benefit of s. 78 (1), and made the following decree:—

“It is ordered and decreed that this appeal be decreed, subject to the proviso under the terms of s. 78 of Act X of 1859, in favor of the defendants (respondents), that is to say, that the said defendants (respondents) be entitled to continue in possession of the *mukarrari* tenure, the subject of the suit, upon their paying into Court within fifteen days from this date the amount decreed.”

From this decision the plaintiff appealed to Her Majesty in Council on the ground that the High Court was wrong in holding that s. 78, Act X of 1859, was applicable.

Mr. Cowie and Mr. J. D. Bell, for the appellant, contended

that the suit being brought to cancel the lease under the 5th clause of s. 23 of Act X of 1859, on account of a breach of a condition of the lease, and not under any power given by the Act, the 78th section could not apply. It was not a case in which the defendants could seek aid on equitable ground, their defence being wholly false. The 78th section was only intended to allow a defaulting tenant against whom a decree for rent has passed to apply within fifteen days after decree on payment of arrears with interest to the date of payment and costs, to stay execution of that part of the decree which ordered the cancelment of the lease; that section would not apply to a case where the Court had passed a conditional decree like the present one, which in fact gave the respondents fifteen days after decree without interest.

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SAHU.

Mr. *Leith*, Q.C., and Mr. *W. C. Mozoomdar* for the respondents were not called upon.

Their LORDSHIPS gave the following judgment:—

This was a suit by the appellant against the respondents, who held under a *mukarrari* lease, for the purpose of recovering arrears of rent, and for the cancellation of the lease in consequence of non-payment, in pursuance of an agreement contained in the lease itself to that effect. The Court below decided in favor of the plaintiff upon the first point, and decreed the arrears of rent; but on the second point decided against the plaintiff on the ground that the suit for the cancellation of the lease was barred by the Statute of Limitations.

Upon appeal to the High Court, that Court confirmed so much of the decision of the lower Court as gave the plaintiff his arrears of rent; but disaffirmed the decision so far as it declared that the Statute of Limitations applied to the claim of the plaintiff to cancel the lease; the Court went on in their judgment to say that in their opinion s. 78 of Act X applied, the latter portion of which is in these terms:—"In all cases of suits for the ejectment of a ryot, or the cancelment of a lease, the decree shall specify the amount of the arrears, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution

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shall be stayed." From this latter part of the judgment, the plaintiff appeals on the ground that he was entitled to a decree declaring the lease to be unconditionally cancelled.

It has been contended that the words of this section, which *primâ facie* certainly would apply to this case, and indeed to all cases of cancellation of leases, were limited in operation by previous sections of the Act, more especially s. 22, which refers to cases where arrears of rent may be "adjudged to be due from any farmer or other leaseholder not having a permanent or transferable interest in the land," and which enacts that "the lease of such leaseholder shall be liable to be cancelled, and the leaseholder to be ejected." It was contended that the latter part of s. 78 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But their Lordships are of opinion that that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one, and they see no sufficient reason for limiting what is the *primâ facie* and natural meaning of its terms to the extent contended for.

Their Lordships are, therefore, of opinion that the High Court was right in its determination on the point in question.

But it has been suggested that the decree of the High Court is ambiguous in its terms. There can be no doubt, their Lordships apprehend, as to what the intention of the High Court was, namely, to give effect to the terms of this Statute, and to declare that the lease should be cancelled unless within fifteen days the rent was paid.

The terms of the judgment are these:—"It is ordered and decreed that this appeal be decreed, subject to the proviso under the terms of s. 78 of Act X of 1859, in favor of the defendants, respondents, that is to say, that the said defendants, respondents, be entitled to continue in possession of the *mukarrari* tenure, the subject of this suit, upon their paying into Court within fifteen days from this date the amount decreed, namely, the sum of —," and so on.

It appears to their Lordships that this decree, in effect, orders

that the lease is to be cancelled upon the non-payment of rent within the time specified. 1872

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That is the interpretation which their Lordships put upon this decree. Should the parties think it necessary to make any application to the Court for the purpose of making the words more clear, that application can, of course, be made, and the Court will exercise their judgment as to whether it be desirable to amend the decree or not.

Their Lordships will advise Her Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Agents for appellant: Messrs. *Watkins and Lattey*.

Agent for respondents: Mr. *Wilson*.

THE HONORABLE SRI MAHARAJA VIJAYARAMA GAJAPATI. P. C.*
RAZ MANEA SULTAN BAHADUR GARU, ZEMINDAR OF VIZIA-
NAGRAM, K.C.S.I. (DEPENDANT) v. SRI RAJA LAKSHMI CHAL-
LAYA (WIDOW OF THE PLAINTIFF). 1872
June 25.

[On Appeal from the High Court of Judicature at Madras.]

Plaint—Act VIII of 1859, ss. 26, 29—Titles of Honor.

Where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person does not contain "the description of the defendant" in accordance with s. 26 of Act VIII of 1839 if such titles are omitted. In such a case the plaintiff should, on the objection being taken by the defendant, be ordered to amend the plaint; and if such order is not complied with, the plaint should be rejected.

APPEAL from a decision of the High Court of Madras (Frere and Holloway, JJ.), dated 22nd January 1866, reversing a decision of the Civil Judge of Vizagapatam dated 5th July 1865.

* *Present*:—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PEACOCK, LORD JUSTICE MELLISH, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PREL.

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This was an action brought by the respondent's husband (since deceased), who was Raja of Bobbily, against the Maharaja of Vizianagram; and the plaint, instead of giving him the full titles set out in the heading of this report, described him as "Sri Raja Vijayarama Gajupati Bahadur, zemindar of Vizianagram, defendant."

By a notification of 27th January 1864, published in the *Gazette of India* for 3rd February of that year, the defendant was appointed an additional member of the Council of the Governor-General for the purpose of making laws and regulations. In that notification he was styled "Maharaja Meerza Vezearam Guzzepetty Raj, Munea Sultan Bahadur of Vizianagram," and by another notification dated 31st March 1864, published in the *Gazette of India* of 9th April 1864, the title of "Maharaja" was conferred on the defendant from that date.

An application was made to Mr. Collett, the Civil Judge of Vizagapatam, on behalf of the defendant, that the plaint should be ordered to be taken off the file as not containing the "description of the defendant" as required by s. 26, Act VIII of 1859, in accordance with which his full titles, which he was entitled to bear from the date of the above notifications, should have been given him.

For the plaintiff it was contended that whatever others may have done, he and his ancestors at least had never spoken of or addressed the defendant or his ancestors either as "Maharaja" or as "Munea Sultan;" and that it was derogatory to his dignity to do so. Certain ancient documents were put in by the plaintiff in support of his statement. The Judge, on the 5th July 1865, held that the defendant was entitled to say that s. 26 had not been complied with by the plaintiff, inasmuch as the plaint did not properly set forth the defendant's "name and description" as far as they could be ascertained. Referring to the notifications of 27th January and 31st March 1864, he was of opinion that the defendant was entitled to be styled "Maharaja," and to be described as "The Honorable" as long as he held a seat in the Council of the Governor-General, and that the "name and description" used and claimed by the defendant were legally his by virtue of the grant and recognition of the Governor-General,

and that they did not depend upon, and were not therefore to be ascertained from, mere usage or habits of courtesy. He held that the defendant was entitled to the full title given him by the notification of 27th January 1864, and made an order under s. 29, giving the plaintiff one week's time to amend his plaint, by entering the name and description of the defendant as above set forth, in default the plaint to be rejected.

The plaintiff failed to amend his plaint, which was consequently rejected under s. 29, but on appeal by the plaintiff to the High Court, a Division Bench, on 22nd January 1866, reversed the decision of the Judge, and ordered the plaint to be restored to the file (1).

The Maharaja having obtained leave to appeal to England, the case now came on.

Mr. *Mundell*, Q.C., Mr. *Norton*, and Mr. *Bowring*, for the appellant, contended that this was a matter of the highest importance to gentlemen in the position of the defendant, and that if the judgment of the High Court were supported, the discomfort of being insulted would be added to that of being a defendant.

Mr. *Field*, Q.C., and Mr. *Grady* contended that the only question under the Act was whether the defendant was sufficiently designated to avoid confusion or mistake. They relied on the case of *Kissen Chand Golacha v. Megraj Kooturia Roy Bahadur* (2), decided by the Calcutta High Court.

(1) 3 Mad. H. C. Rep., 31.

(2) *Before Mr. Justice Glover and Mr. Justice Miller.*

The 29th November 1869.

KISSEN CHAND GOLACHA (PLAINTIFF) v. MEGRAJ KOOTURIA ROY, BAHADUR (DEFENDANT).*

Plaint—Titles of Honor—Act VIII of 1869, ss. 26, 29.

The *Advocate-General* (Mr. *Cowie*) (Baboo *Ashootosh Chatterjee* and *Jadub Chunder Seal* with him) for the appellant.

Baboo *Kally Kishen Sen* for the respondent.

THE judgment of the Court was delivered by

GLOVER, J.—We think that the order of the Officiating Judge in this

* Miscellaneous Special Appeal, No. 400 of 1869, against the order of the Officiating Judge of Zilla Moorshedabad, dated the 23rd August 1869, affirming an order of the Officiating Sudder Munsif, dated the 2nd August 1869.

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Their LORDSHIPS gave the following judgment:—

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This is an appeal against the judgment of the High Court, which reversed the decision of the Judge of the Civil Court of

case is wrong, and must be set aside. The plaintiff sued the defendant for a *kabala*; the defendant in the first instance appeared and asked the Court for a postponement of seven days for the purpose of procuring the attendance of certain witnesses whose evidence was said to be important to the defence; this indulgence was granted to him: afterwards he made an objection to the wording of the summons, stating that his proper title was Roy Bahadur, which title had not been written in the summons calling upon him to defend the case.

The Munsif, on the defendant's application, ordered the plaintiff to amend his plaint within five days, and on his failure to do so rejected his plaint under s. 29 of the Code of Civil Procedure.

On appeal the Judge decided that although the decision of the Munsif was not exactly called for of necessity under the circumstances of the case, still he thought that he had the power to reject the plaint, the plaintiff having omitted to obey the order of the Court directing him to amend his plaint; he also thought that there was another reason why the plaint should be rejected, namely, because the trade or profession of the defendant had not been stated as required under s. 26 of the Code, he therefore upheld the lower Court's order and dismissed the appeal.

It appears to us that there was no necessity for any such rejection of this plaint. The object of the law is to identify the parties to the suit, and it is perfectly clear in this case that the right person was brought before

the Court, for he appeared and himself admitted that he was the party sued and only applied for a certain delay in the first instance, in order that he might procure the attendance of some witnesses whom he stated to be necessary to the defence, and it was only on an after-thought that he subsequently raised the objection that his title had not been properly set out in the summons. S. 26 says that the summons shall contain the name, description, and place of abode of the defendant, so far as they can be ascertained. In this case the name and place of abode were given, and the only thing that was not given in the summons was the title of Roy Bahadur. If there had been any doubt as to the identity of the person sued—if, for instance, there had been two persons of the same name,—it may be that it would have been necessary to put in the summons the title of the defendant, but we think that the term description in the section applies rather to the family of the parties summoned; for instance, the father's name is required to be stated so as to make it certain that the right party attended the Court.

Both the lower Courts seem to have rejected the plaint in this case on account of what they call the contumacious disobedience of the plaintiff to the Court's order to amend his plaint by the insertion of the words Roy Bahadur; but the only power given by the Act under which the Judge can reject a plaint is when the plaintiff has omitted to insert certain information which the law requires to be inserted, and the law nowhere says

Vizagapatam, dated—and the date is material for the decision of the present question—the 5th July 1865. The question which the appeal raises is the effect to be given to the 26th and 29th articles of the Code of Procedure. The 26th article requires that the plaint shall contain the name, description, and place of abode of the defendant, as far as they can be ascertained, and the 29th section provides that if the plaint does not contain the several particulars thereinbefore required to be specified therein, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended.

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In the present case a plaint was filed by the Raja of Bobbili against the appellant, whom I may shortly describe as the Maharaja of Vizianagram. The objection taken to the plaint was that the defendant was described on the face of that plaint by titles which did not correspond with the full titles to which he was entitled, and by which he ought to have been described. The Judge thought that objection was made out, and he directed that the plaintiff should have liberty to amend his plaint by amending the description of the defendant, in accordance with the description which had been given to him in the Gazette, by which he was appointed a member of the Governor-General's Council for making Laws, namely, the "Honorable Maharaja Meerza Vezearam Guzzepetty Raj Munea Sultan Bahadur of Vizianagram." He gave the plaintiff a "week's time to amend his plaint by entering the name and distinction of the defendant as above set forth, and in default the plaint will stand rejected." The plaintiff, the respondent, declined to amend his plaint, and failed to do so. The Judge then rejected the plaint under the 29th section, and upon appeal to the High Court that order of rejection was reversed, and it was held that the identity of the appellant

that the plaintiff's refusal to insert certain words, other than that information, which the Court thinks ought to be inserted, would be any sufficient reason for rejecting the plaint. It appears to us, therefore, that the object of the law, which was to properly identify the defendant, has been fully carried out in this case, and that the suit ought to be tried on its merits.

We remand the case to the lower Court for this purpose, and this special appeal is allowed with costs.

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having been ascertained by the imperfect description, the order to reject the plaint ought not to have been made.

The dispute between these parties seems to have been a very ancient one. There appears to have been a feud between these two great proprietors for a considerable time as to the titles to which they were respectively entitled. It further appears, however, that as early as 1861 the then Agent of the Governor of Madras in Vizagapatam had ascertained what titles were the titles by which these parties were respectively known. I think the phrase is what titles "were in vogue," and he ordered that in all official documents those titles should be given by the one to other. The respondent or his father raised an appeal against that order. There was an elaborate report made by a Mr. Carmichael to the Government, and the Government of Madras passed an order upon that, which is dated the 26th April 1865, by which they ruled that the order of the Agent should stand, and that those titles should be treated as the titles necessary to be given in official documents. That, therefore, was a recognition by the Local Government of Madras that the appellant was entitled to the titles specified in the order of the Agent, Mr. Fane. It was also something more, because, while this question was pending before them, the Government of India, by the then Viceroy, had formally conferred upon the appellant the title of Maharaja. Therefore, if there had been any question upon his claim to that title at an earlier date, that doubt was entirely removed by the formal act of Government, and the grant of the title from that which must be taken to be in India the fountain of honor.

Now it is no doubt the fact that the plaint in the present case was filed before that order of the Government of Madras to which I have just referred. It was, however, filed after the grant of the title of Maharaja; and after the appointment of this gentleman to be a member of the Governor-General's Council for making Laws, by the notification in the Gazette in which he received his full titles, and was described in the manner in which the Judge afterwards required the respondent to describe him; and further it is certain, that the order of the Government of Madras was passed and issued before the

question raised upon this objection under the Code came to be tried and the decision of the Judge upon it was passed, because that, as I stated, was not until July 1865.

In these circumstances the question for their Lordships' consideration is, whether the order of the Judge, which he was competent to pass, and indeed ought to have passed, under the Code of Procedure, or whether the decision of the High Court reversing it, is the correct one?

No doubt the question which is now brought before their Lordships might by some persons be considered frivolous. It does not appear to their Lordships, however, to be by any means a light question. It is certainly (as one of their Lordships remarked in the course of the discussion) strongly against the policy of the law that anything should be done which tends to increase that which has been always one of the great social evils of India, *i.e.*, the indisposition of persons of consequence to appear as suitors in Courts of Justice. It appears to their Lordships that upon the proper construction of the Code the description contemplated by the 26th article includes all those titles by which the party is generally known; and that if a plaintiff from animosity, from pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, as insult no doubt it would be treated not only in India but even in other countries.

In the present case it is not necessary for their Lordships to consider whether if there were a *bonâ fide* dispute in the suit, or otherwise, as to the existence of the title, or as to the right of the party to bear a particular title, the Judge would in every case exercise a sound discretion in rejecting the plaint. For it appears to their Lordships that here the matter was entirely put by the proceedings already referred to beyond dispute, and that it was impossible to say that the titles, if properly treated as falling within the term of description, could not be ascertained. An order had been passed in the district, with the view, apparently, of keeping the peace between these great proprietors, that in all official documents each should

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describe the other by a certain title; that order had been recognized after appeal and discussion and inquiry by the Government of Madras; the titles themselves had been recognized by the highest authority in India,—by the Governor-General in Council,—and confirmed by a distinct grant of the principal title, that of Maharaja, and therefore there could be no pretence or excuse for saying that there was any doubt whatever as to the legal right of the appellant to bear those titles which he claimed to bear. Their Lordships are therefore of opinion that the Judge of the Civil Court was competent to pass the orders which he passed; and that he exercised a sound discretion in first requiring the respondent to amend his plaint, and afterwards in rejecting that plaint when the first order had been contumaciously disobeyed.

The only point on which their Lordships have entertained a doubt is whether it was essential for the Judge to require the term “Honorable,”—which seems to be less matter of description than a mere honorary distinction, applying to those who are members of the Council,—to be stated in the plaint. It is, however, to be observed that the respondent, when he appealed to the High Court, did not raise any point as to that. He raised broadly the question whether he was bound to give the appellant what he called his honorific titles, or whether it was not sufficient simply to describe him in a way in which he could be distinguished from any other person.

Their Lordships are aware that in coming to the before-mentioned conclusion they are ruling that which is in some degree in conflict with a decision passed by the High Court of Bengal in the case of *Kissen Chand Golacha v. Mejrāj Kooturia Roy Bahadur* (1). It is to be observed, however, that, as it was fairly admitted at the bar, that case is in one particular distinguishable from the present, inasmuch as there the defendant had not taken the objection in the first instance, but had asked for further time, and afterwards took the objection by way of afterthought. It is, however, scarcely necessary to observe that even if the case had been on all fours with the present,

(1) *Ante*, p. 445.

it would not have been a decision, passed as it was by a Division Bench of the High Court, which would have been binding upon their Lordships; and for the reason which I have stated, their Lordships are of opinion that it is not the true construction of the Act in question to say that where a man has titles, the claim to which titles cannot rationally be disputed, and by which he is generally known, all that the Code requires is that he should be described in such a way as has been contended for by the respondent.

Their Lordships, under these circumstances, will humbly advise Her Majesty that the decree under appeal be reversed, that the order of the Zilla Judge be affirmed, and that the respondent do pay the costs of this appeal, and in the High Court.

Appeal allowed.

Agents for appellant: Messrs. *Williamson, Hill & Co.*

Agents for respondent: Messrs. *Gregory, Rowcliffes & Co.*

APPELLATE CIVIL.

Before Sir R. Couch, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice Ainslie.

OMDA KHANUM, FOR SELF AND AS GUARDIAN OF NOWABUNNISSA BEGUM, *alias* SHAHEBZADI BEGUM, MINOR, AND OTHERS (DEFENDANTS) *v.* BROJENDRO COOMAR ROY CHOWDHRY (PLAINTIFF).^{*}

1874

March 12.

Interest, Rate of—Stipulation in Ikrar—Act XXVIII of 1855, s. 2—Penalty—Contract Act (IX of 1872)—Reg. III of 1793, s. 21.

The plaintiff advanced money to the defendants on an *ikrar*, by which it was agreed that he was to allow them to draw on him to the extent of Rs. 20,000 within three years, the plaintiff to repay himself by having

* Appeal No. 2 of 1873, under cl. 15 of the Letters Patent of the 28th December 1865, from the decision of Markby, J. (differing from Birch, J.), dated the 19th July 1873, in Regular Appeal 155 of 1871, from a decree of the Subordinate Judge of Dacca, dated the 27th March 1871.

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an *ijara* of the defendants' share in certain property which his loan was to aid them in recovering. A 4-anna share of the profits, after deducting Government revenue and expenses, was to go in payment of interest on the money lent; half of the remaining three-fourths to go towards payment of the principal, and the other half to the defendants. If, at the end of the term, any balance remained due to the plaintiff, the defendants were to pay it with interest at 18 per cent. If the defendants failed to give the *ijara*, they agreed to pay the amount borrowed with interest at $6\frac{1}{2}$ per cent. per mensem. The plaintiff advanced the money and obtained a receipt therefor from the defendants. The defendants failed in giving the plaintiff the *ijara*. In a suit brought to recover the sum lent by the plaintiff with interest, the first Court gave a decree for the plaintiff for the sum claimed with interest at the higher rate stipulated for in the *ikrar*, viz., 75 per cent. On appeal by the defendants to the High Court, the contention was raised that the high rate of interest amounted to a penalty which the Court would not enforce, and that the contract was unreasonable and oppressive in character. The Judges differed in opinion, BIRCH, J., holding that the contract was inequitable and oppressive, and that, notwithstanding the repeal of the usury laws by Act XXVIII of 1855, the Court was not bound to decree interest at the rate stipulated for by the parties; and MARKBY, J. (whose opinion prevailed) being of opinion that, since the passing of Act XXVIII of 1855, there was no legal restriction on the rate of interest; that the stipulation for interest at 75 per cent. was not a penalty, but an alternative stipulation for interest at a higher rate on the happening of events under which the lender incurred a greater risk, and that the contract should be enforced.

Held (on appeal under cl. 15 of the Letters Patent) that the stipulation in the *ikrar* for interest at 75 per cent. was not in the nature of a penalty, nor was it an alternative stipulation; it was an estimate by the parties of the damages to which the plaintiff would be entitled in the event of a breach of the contract by the defendants in not giving the *ijara*.

Held also that, in the absence of evidence of any fiduciary relation between the parties, of any imposition or misrepresentation on the part of the plaintiff, or any want of capacity on the part of the defendants, and there being nothing in the circumstances which led to the execution of the *ikrar* to show that there was any constructive fraud on the part of the plaintiff, or any undue advantage taken by him, the contract was not one which the Court would set aside as being unreasonable, inequitable, or oppressive in character.

Seemle.—The Contract Act (IX of 1872) is not retrospective.

APPEAL under cl. 15 of the Letters Patent from the judgment of Markby, J., sitting with Birch, J., the Judges differing in opinion.

The plaintiff sued to recover Rs. 20,000 advanced by him to the defendants, and interest thereon under the terms of an *ikrar* given by the defendants, Khaja Abdool Kurreem

for himself and as guardian of Khaja Abdool Gunny, Syud Mahmood for himself and as attorney for his wife Azeezoonnissa Khanum, his father Asaddooddeen and Fatima Banoo, the wife of his younger brother. The defendants were engaged in disputes as to some property in Pergunna Sreerampore, in which they alleged they were entitled to a 7as. 16gs. 2cs. 2kts. share, and the money was advanced to them by the plaintiff to prevent the sale of their property for arrears of revenue, of which there was some danger, and to enable them to recover their share from one Mahomed Mirza, who had taken and retained possession of the entire sixteen annas of the property. The *ikrar* was filed by the plaintiff and bore date the 25th Chaitra 1275 (6th April 1869). A receipt given by the defendants dated 25th Paus 1276 (9th January 1870), ten months later than the *ikrar*, purporting to be signed by Khaja Abdool Kurreem, and by Syud Mahmood for himself and as mookhtar of the remaining shareholders, was also filed by the plaintiff. The *ikrar* set forth that the plaintiff had agreed to allow the defendants to draw upon him to the extent of Rs. 20,000 within three years, the plaintiff to repay himself by having the *ijara* of the defendants' share in the property for ten years, commencing from 1st Baisakh 1277 (April 13th, 1870). A four-anna share of the profits, after deducting Government revenue and expenses of collection, was to go in payment of interest upon the money lent; half of the remaining three-fourths was to go towards payment of the principal, and the other half to the defendants, according to their fractional shares. If, at the end of the term, any balance remained due to the plaintiff, the defendants were to pay it with interest at 18 per cent. Failing that, the plaintiff was to retain possession on the same conditions until the amount borrowed had been liquidated. The grant of the defendants' *ijara* was to be deferred for twelve months, to enable them to ascertain the income of their share. If they failed to grant the lease, the defendants agreed to pay the amount borrowed with interest at $6\frac{1}{4}$ per cent. per mensem, or 75 per cent. per annum. If the plaintiff refused the *ijara*, he was to receive only the principal without interest within six months from the date of the refusal.

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The loans to the defendants commenced in Chaitra 1275 (April 1869) and continued for about ten months, when the plaintiff finding the speculation a losing one, and that the defendants were not likely to succeed in their endeavour to recover the property, insisted on the receipt, which was given him by the defendants, and which was filed by him in the suit.

In his written statement the defendant Mahmood denied having received the money; and alleged that the *ikrar* filed by the plaintiff was forged; that no *ikrar* was executed on 25th Chaitra, but that one was executed on 2nd Chaitra 1275, according to the terms of which the plaintiff took over the management of the property in the possession of himself and his co-sharers, and realized a very large sum of money. He also stated in his written statement that his signature to the receipt was obtained by fraud and misrepresentation, and by promises of rendering an account; but he subsequently stated in a petition to the Court that the receipt was obtained by threats of involving him in some criminal case if he did not sign it. The written statements of the other defendants, excepting Abdool Kurreem, were to the effect that the *ikrar* filed was not the *ikrar* executed, and they generally supported the statement of Syud Mahmood. Abdool Kurreem admitted the execution of the receipt, and the execution of the *ikrar*, and the fact of the money having been applied for the benefit of the family.

The disputes as to the property resulted in an amicable settlement, under which Mahomed Mirza's possession of the whole property was confirmed, he having obtained the *ijara* of their shares from his co-sharers, and thus the defendants were prevented from giving the plaintiff an *ijara* as stipulated in the *ikrar*.

The question was raised by the defendants that the plaintiff had waived his right to the *ijara*, and had consented to the compromise into which they had entered with Mahomed Mirza, and that he had exonerated them from their liability to give him the *ijara*. The evidence relied on by the parties for and against this contention was gathered from the correspondence which passed between the parties while the negotiations as to the *ijara* were going on. The defendants relied on a letter of the plaintiff

iff dated 22nd Magh 1276 (3rd February 1870) as being a waiver on his part; the portion relied on being as follows:—"I have heard of the compromise that has been determined on with Mahomed Mirza. I shall entirely agree to whatever may be for your advantage. You will try and get this matter executed as soon as possible." "The other letters on this subject were letters of 4th and 11th April 1870, in which the plaintiff gave the defendants notice that he still claimed the *ijara*; and a letter from the defendants of 11th April 1870 in which they said:—"You have not rendered an account within the term showing receipts and disbursements, nor up to this date have you taken steps to secure the *ijara*. Moreover, your manager Mohesh Chunder Biswas has declared his unwillingness to take the *ijara* in your behalf. This is also the tenor of your letters. Nevertheless, we inform you that if, within fifteen days, you can render an account and prove the amount due to you, we are still willing to grant you the *ijara*."

The Subordinate Judge found that the *ikrar* and the receipt filed by plaintiff were genuine and duly signed by the parties; that the defendant Mahmood was duly authorized to sign for his father Asaddooddeen and his wife Azeezoonnissa, but that he was not so authorized with respect to Fatima Banoo, and that she consequently was not liable on the *ikrar*. He also found that there was no evidence of such an *ikrar* as that alleged to have been executed on 2nd Chaitra; that the money was duly advanced by the plaintiff, consequently the defendants having failed to perform their agreement were liable on the *ikrar*. From this decision the defendants appealed to the High Court.

The *Advocate-General*, offg. (Mr. Paul) (Baboos Annoda Persad Banerjee, Chunder Madhub Ghose, Kakimohun Doss, and Romesh Chunder Mitter with him) for the appellants.

Mr. Woodroffe (Baboos Srinath Doss, Doorga Mohun Doss, and Mohini Mohun Roy, with him) for the respondent.

The arguments sufficiently appear in the judgments. The following cases were cited:—

For the appellants—*Ram Lal Mookerjee v. Haran Chandra*

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Dhar (1), *Khusalchand Lalchand v. Ibrahim Fakir* (2),
Ramkrishnabhat v. Vithoba (3), *Vinayak Sadashiv Voze v.*
Raghi (4), *Bichook Nath Panday v. Ram Lochan Singh* (5), and
Boley Dobey v. Sideswar Rao Baboo Roy Kur (6).

For the respondent—*Sainter v. Ferguson* (7), *Dimeck v.*
Corlett (8), *Brojokishore Roy v. Madhub Persad Misser* (9),

- (1) 3 B. L. R., O. C., 130.
- (2) 3 Bom. H. C. Rep., A. C., 23.
- (3) *Id.*, 25.
- (4) 4 Bom. H. C. Rep., A. C., 202.
- (5) 11 B. L. R., 135.
- (6) 4 B. L. R., App., 92.
- (7) 7 C. B., 716; see p. 727.
- (8) 12 Moore's P. C., 199; see p. 229.
- (9) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

The 4th January 1872.

BROJOKISHORE ROY (DEFENDANT) v.
 MADHUB PERSAD MISSER
 (PLAINTIFF).*

Interest, Rate of—Penalty—Contract.

THIS suit was brought to recover the sum of Rs. 500, and interest Rs. 354, due on a bond, by which it was stipulated that interest was to be paid at the rate of 2 per cent. per mensem, but that if the principal sum was not paid within five months, interest was to be paid thereon at the rate of 6 per cent. per mensem from the date of the bond until the date of realization. The bond in question was executed by the defendant in favor of the plaintiff as security for a loan made to him by the plaintiff, in order to protect certain property belonging to the defendant from sale for arrears of Government revenue. The defendant admitted the execution of the bond, and the receipt of the loan, but pleaded that the higher

rate of interest stipulated for in the bond could not be enforced as being contrary to Hindu law, and as being in the nature of a penalty. The Munsif gave the plaintiff a decree for the principal sum with interest at 2 per cent. from the date of the bond. On appeal the Judge varied this decree by giving the principal sum with interest at 2 per cent. per mensem for five months from the date of the bond, and afterwards at 5 per cent. to the institution of the suit. The defendant preferred a special appeal from this decision to the High Court generally on the same ground as that taken by him in the lower Court, viz., that the rate of interest was one which was of the nature of a penalty and could not be enforced.

Baboo *Bykant Nath Dass* for the appellant.

Baboo *Kashi Kant Sen* for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—It appears to me that the defendant has no ground of special appeal in this case. We are bound to give effect to the contract entered into between the parties, and as the parties distinctly stipulated that in the event of a failure to repay the amount advanced with interest at a certain rate

* Special Appeal, No. 887, against the decree of the Judge of Zilla Tipperah, dated the 20th April 1871, modifying a decree of the Additional Munsif of that district, dated the 18th July 1870.

In re Nobo Coomar Bose (1), and Aurulu Mastry v. Wakuthu Chinnayan (2).

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on a particular day the lender was to be entitled to interest at a different rate, we are not authorized to say as a matter of law that such stipulation is to be regarded as a penalty. We are referred to *Boley Dobe v. Sideswar Rao Baboo Roy Kur (a)* in which the particular facts of the case had induced the Court to deal with such stipulation in that way, and to treat it as in the nature of a penalty; and, looking to the conduct of the parties, and having the matter before it in regular appeal, the Court intimated an opinion that an equitable decision had been come to by the Subordinate Judge, and that it would not interfere. But in this case we cannot say, as a matter of law, that the Court below is wrong in allowing interest at the rate stipulated by the parties in their contract.

The special appeal is dismissed with costs.

(1) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

The 27th March 1872.

IN THE MATTER OF THE PETITION OF NOBO COOMAR BOSE.

Interest, Rate of—Penalty—Bond.

Baboo Gria Sunkur Mojomdar and Issen Chunder Chuckerbutty for the petitioner.

Baboo Bungshi Dhur Sen contra.

THE judgment of the Court was delivered by

KEMP, J.—On the 21st of February last, the petitioner obtained a rule on

the opposite party to show cause why the order of the Small Cause Court on the question of interest should not be set aside: a pleader appeared for the opposite party to show cause, and both parties have been heard through their pleaders. It appears that the petitioner sued the opposite party in the Small Cause Court of Goalundo on a *khut*. The principal claimed was Rs. 99, interest Rs. 81-4; total, Rs. 180-4. Paid off Rs. 118-11-6; balance due Rs. 61-8-6; relinquished Rs. 1-8-6, due Rs. 60. Execution of the *khut* was admitted: and the defendants not being able to prove the plea set up by them, namely, that they paid more than the plaintiff gave them credit for, the Small Cause Court Judge decreed the case, awarding interest up to due date at the rate of 2 per cent. per mensem, and afterwards, up to date of realization, at the rate of 1 per cent. per mensem. The petitioner then came up to this Court on the ground that the Small Cause Court Judge was wrong in awarding interest at the rate of 1 per cent. from due date, inasmuch as he had no discretion to allow interest at a rate below that stipulated in the bond.

On referring to the bond, we find that the terms of it are very clear. Rs. 99 was the sum borrowed, and it is stipulated that the interest to be paid thereon is 2 per cent. per mensem, and that this rate of interest will be paid,

“সমুদয় টাকা আদায়ের তারিখ

(2) 2 Mad. H. C. Rep., 206.

* Petition against the decree of the Judge of Small Cause Court, Goalundo, dated 15th January 1872.

(a) 4 B. L. R., App., 92.

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BIRCH, J. (after stating the facts and commenting on the evidence at some length, continued).—Having arrived at the conclusion that the *ikrar* is genuine, I have now to consider which of its provisions ought, under the circumstances which have now arisen, to be enforced. Probably, neither party contemplated the present state of things. I cannot find that the plaintiff ever actually refused the *ijara* in so many words, but I treat his assent to its being granted to Mahomed Mirza as tantamount to a refusal, and carrying the same consequences. I treat Mahmood's offer of it as made merely to get up a piece of evidence. The plaintiff assented to the "arrangement proposed," and what that arrangement must have been I have already pointed out. The defendants have failed to execute, or rather have been prevented from giving, an *ijara* lease in favor of the plaintiff. They agreed upon such failure to repay the amount borrowed with interest at $6\frac{1}{4}$ per cent. per mensem (75 per cent. per annum). The lower Court has given a decree for interest at that rate, and the question now to be determined is, whether that portion of the decree can be supported.

It was contended on behalf of the appellant that we ought to be guided by the Contract Act (IX of 1872), ss. 73, 74, and 75, in deciding this case. Now the contract we are dealing with was executed on the 6th April 1869. The Indian Contract Act became law on the 1st September 1872. I consider that that law can have no retrospective effect.

The principle of the civil law (*omnia constituta non preteritis calumniam faciunt sed futuris regulam imponunt*) as to new laws not having retrospective force has been transferred into the chief modern codes. The Code Civil, Art. 2, runs thus:—"La loi ne dispose que pour l'avenir, elle n'a point d'effet rétroactif."

ভক, "—that is to say, up to date of payment of the whole sum borrowed. There being, therefore, this clear stipulation in the bond that the judgment-debtor was liable for interest at the rate of two per cent. per mensem, under s. 2 of the Usury Law, the Small Cause Court Judge had no discretion in the

matter, and he was bound to award interest at the rate of 2 per cent. per mensem up to date of realization. This decision must therefore be amended accordingly, and interest at the rate of 2 per cent. per mensem will be awarded up to date of payment. The petitioner will recover his costs of this application.

The Prussian Code enacts:—"New laws cannot be applied to acts and events that have previously occurred." The Austrian Code provides:—"Laws have no retrospective effect; they have, therefore, no influence on previous acts or acquired rights." And the English cases of *Hughes v. Lumley* (1) and *The Mayor of Berwick v. Oswald* (2) seem to me to support the view that an Act regulates the future and not the past, unless it appears from the Act itself that the intention of the Legislature was otherwise.

It was also pressed upon us that the contract was invalid under the Hindu law, and we were referred to a case of *Ram Lal Moorkerjee v. Haran Chandra Dhar* (3), and to cases of *Khusalchand Lalchand v. Ibrahim Fakir* (4), *Ramkrishnabhat v. Vithoba* (5), and *Vinayak Sadashiv Voze v. Raghi* (6). It is unnecessary to consider the Bengal case upon which so much stress has been laid, inasmuch as Courts not established by Royal Charter have only to follow Hindu and Mahomedan law in cases regarding succession, inheritance, marriage, caste, and all religious usages and institutions, see Regulations IV of 1793, s. 15, and VIII of 1795, s. 3; and the decision quoted was passed on the original side of the High Court, which, in matters of contract, was by statute required to determine questions arising between Mahomedans and Gentus by their laws and usages. That decision can be no guide to us in dealing with a case coming from a Court not established by Royal Charter. It seems to me that, Act XXVIII of 1855 notwithstanding, it must occasionally be the duty of a Civil Court in India, to decline to give effect to agreements under which an undue advantage is exacted from persons under grievous necessity, and under circumstances from which it may be inferred that they did not fully comprehend the extent of the obligations they were incurring. Landholders in the interior of the country are, under our strict revenue system, often at the mercy of grasping money-lenders, whose ultimate object is to obtain their estates; and the landholder is too often deprived of all legal advice, and not only ignorant of law, but of all business matters.

Inadequacy of consideration, urgent need of money, and

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(1) 4 E. & B., 358.

(4) 3 Bom. H. C. Rep., A. C., 23.

(2) 3 E. & B., 653; see p. 678.

(5) *Id.*, 25.

(3) 3 B. L. R., O. C., 130.

(6) 3 Bom. H. C. Rep., A. C., 202.

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ignorance are ingredients which must have some weight upon a Court of Equity, in considering whether it will enforce an agreement; and all these ingredients are to be found in this case. For an advance of Rs. 20,000, the defendants were to assign to the plaintiff for ten years ten-sixteenths of the profits of a property yielding an income of about Rs. 2,800 a year on their share. Only the remaining six-sixteenths was to be allowed to the defendants for maintenance. Of the inadequacy and unfairness of this arrangement, there can be no doubt, and the transaction marks over-reaching on one side, and extreme ignorance on the other.

I treat the case as a mere question of interpretation of a contract of a very peculiar nature, in which it is useless to look for authority to any other system of law, but in which we must be guided by the provisions of s. 21, Regulation III of 1793, now incorporated in Act VI of 1871 (1), to which we, in the exercise of our appellate jurisdiction, are bound to conform.

There are three stipulations in the *ikrar*: one which we need not now consider is that no interest shall be paid if the debt is liquidated within six months of the plaintiff's refusal to take the *ijara*; the second is the interest for delay in payment, calculated at 18 per cent., upon any balance remaining due after the term of the *ijara* shall have expired; the third is the stipulation for 75 per cent. per annum, if the defendants fail to give the plaintiff the lease.

What the plaintiff contemplated was permanent possession of the defendants' share of the estate; first temporary possession under an *ijara*, the conditions of which are very hard upon the defendants, and then permanent under a *patni*. About the middle of 1276 (1869-70), he began to realize that the defendants could not get their shares into their own hands,—a necessary preliminary to their granting an *ijara*. And in Magh 1276 (February 1870), the plaintiff by his letter approving of the compromise between the defendants and Mahomed Mirza, whom he had previously been assisting them to oppose, virtually put an end to the penultimate condition in the *ikrar*, and waived his claim to the *ijara* and to

(1) See s. 24.

the exorbitant interest, which was to be the consequence of the defendants' failure to grant the *ijara*.

The debtors were in the latter part of 1276 (April 1870), it seems to me, in the condition of persons who being parties to a contract had, by the pressure brought upon them by an adverse co-sharer, been incapacitated from fulfilling their contract to grant the lease. This alone would be a ground for rescinding this portion of the contract. And when, in addition to this, I find the plaintiff assenting to an arrangement which of necessity dissolved the contract to grant the lease, I cannot consider it in accordance with equity or good conscience to say that, though he acquiesced in an arrangement which dissolved the first clause of the sentence regarding the lease, he could yet retain and sue upon the latter clause of the sentence which made 75 per cent. interest the penalty for not granting the lease. The language in which the agreement is drawn up has no equivalent for "liquidated damages" or "penalty," and the contracting parties or their advisers may be fairly assumed to know nothing of these technical terms. They use the word *sud*, or interest. I think it important, in interpreting this deed, to bear in mind that it was drawn up in the interior, where legal advice, in the proper sense of the words, is not to be obtained; and I cannot divest my mind of the impression, founded on some experience of the stolid ignorance of, or indifference to, business matters amongst the uneducated landholders, that the defendants did not really understand to what extent they were placing themselves and their property in the hands of the plaintiff. And if I did not treat, as I do, the plaintiff's letter of the 22nd Magh (3rd February) as an assent to the dissolution of that part of the contract which relates to the *ijara*, and the interest consequent on a refusal to grant it, I should still hold that the repeal of the usury laws would not prevent Courts, constituted as our Courts in this country are, from setting aside an unconscionable agreement made with a necessitous man, on the ground of inequality, as being an unreasonable advantage taken of his necessitous situation, and as being oppressive and unjust (Colebrooke on Obligations, p. 57). It has been said by the Lords of the Privy Council that the Courts of this country exercise a wider jurisdiction than the Courts of Equity

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in England; and I find the following remark as to the powers of the Court of Chancery in the judgment in the case of *Barrett v. Hartley* (1):—"But it is an observation of some importance now that the usury laws are repealed, that one effect of such repeal was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of this Court which existed long before them—I mean, that principle of the Court which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity and want of money, from prevailing against him. Whoever has attended to the subject must have seen that the moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the Court which prevailed independently of the usury laws was likely to be called into active operation." The Bombay Court has held that Act XXVIII of 1855 does not prevent a Civil Court in India from examining into the character of agreements and from declining to enforce such agreements, unless they are shown to be fair and reasonable—*Vinayak Sadashiv Voze v. Raghi* (2) and *Kedari v. Atmarambhat* (3); and in the Circular of the Punjab Chief Court, recently circulated by this Court to all judicial officers by Circular No. 8, 30th April 1873, para. 14, it is said:—"The Courts may consider whether or not the contract was a prudent one, . . . with a view to determining whether extreme imprudence, from which, along with other circumstances, the existence of undue influence might be inferred, has or has not been manifested" (4). And in para. 10, the language conveys the spirit of V.-C. Stuart's remarks above quoted. It runs thus:—"The repeal of the usury laws by Act XXVIII of 1855 . . . has left untouched the doctrines of equity, both as to the protection of debtors who for any real reason are not fully competent to protect themselves, and as to the power of Courts to relieve against what are called unconscionable bargains with such persons;" and in para. 11:—"No strict rule defines or can define where comparative incapacity ceases, and where extreme ignorance and

(1) L. R., 2 Eq., 789; at p. 795.

(3) 3 Bom. H. C. Rep., A. C., 11.

(2) 4 Bom. H. C. Rep., A. C., 202.

(4) 11 B. L. R., H. C. Rules, 19.

helplessness call for the protection of the equitable rules prescribed by law" (1).

The defendants never got possession of their share, and never were in the position contemplated in the *ikrar*, and, under the circumstances, I think that a Court of Equity should not compel the defendants to pay for the use of Rs. 20,000 for 14 months and 19 days the sum of Rs. 17,855-8-8 as interest, which is what the plaintiff's claim amounts to up to date of decree, if interest is calculated at $6\frac{1}{2}$ per cent. per mensem, or 75 per cent. per annum, and for which the Subordinate Judge has given him a decree. The compensation that such a Court will give for breach of contract under such circumstances, and the test of the relief it will afford is, I apprehend, the damage really incurred by the money-lender. Now this *ikrar* and the other bonds show that 18 per cent. was the interest the plaintiff was content to receive in the usual course of his business in making advances on personal security. And, in my opinion, if he receives the full amount of Rs. 20,000, with interest thereon at 1-8 per cent. per mensem from the date of the loan to the date of the decree, he will receive all that he can justly claim. From that date up to realization interest to run upon the amount decreed at 6 per cent.

It is with some diffidence that I dissent from my learned colleague, but I cannot hold that Act XXVIII of 1855 debars me from applying to the case under consideration the rule of equity and good conscience, or that I am compelled by that enactment to support, or carry into execution, so oppressive and inequitable an instrument as this *ikrar*.

MARKBY, J.—Upon the general facts of the case, I agree with the conclusions come to by Birch, J.; and as these are substantially the same conclusions as were arrived at by the Subordinate Judge, in whose opinion I place great confidence, I do not consider it necessary to state my reasons separately. I have no doubt whatever that the plaintiff's case is substantially a true one; that the money was advanced, and the receipt given after going through the accounts; which receipt was, I think, under the circumstances, a sufficient acknowledgment, as

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(1) 11 B. L. R., H. C. Rules, 18.

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against all the members of the family, that the money had been advanced properly, and that they were liable for it. I have no doubt, also, that the document before us is the genuine *ikrar*; I do not think the plaintiff was ever in possession of any portion of the income of the estate, and I consider it established that Thakoor Doss Bhattacharjee was the defendants' servant, and acted under their orders. As to the exact position of the parties at the commencement of the year 1870, I do not take quite the same view as my colleague Birch, J., and upon this I shall observe presently.

In order to ascertain the rights of the parties in this case upon the facts found, it is necessary first to consider the construction of the *ikrar*. It seems to me that that document contemplates three contingencies: first, that the plaintiff should get into possession of the property under the *ijara*, in which case provision is made that the advances should be repaid with interest at not less than 1-8 per cent. per mensem; second, that the parties who agreed to do so should fail to execute the *ijara*, or lease, on the 13th April 1870, or before, according to their engagement, in which case the advances were to be repaid with interest at the rate of one anna in the rupee, or 6-4 per cent. per mensem; third, that the plaintiff should refuse to accept the *ijara*, in which case the advances were to be repaid without interest within six months of the date of the refusal. Now the events which have happened, to which we have to apply these alternative stipulations, are these. The defendants, or those whom they represent, as appears by the evidence, had, after the *ikrar* was executed, negotiated with another person, Mahomed Mirza, with whom they were contending for the possession of this property for the grant to him of an *ijara* of their share. This was known to the plaintiff's agent Mohesh Chunder Biswas, and was not disapproved by him, and he at one time appears to have favored this project; but there is no evidence that it was expressly consented to by the plaintiff prior to the letter of the 3rd February 1870, though it may be fairly presumed that Mohesh Chunder Biswas was acting with the plaintiff's sanction. Now it appears to be contended—for on this, as on many other points, the defendants' case was not put at all clearly—that the plaintiff, by acquiescing in

this grant of the *ijara* to another, has waived his rights under the second alternative. As to the assertion that the plaintiff refused to take the *ijara* which the defendants were ready to grant, I do not think that there is a shadow of foundation for it. It was a mere pretence on the part of Syud Mahmood to write the letter of the 11th April 1870, offering the *ijara*; and I agree with the Subordinate Judge and with Birch, J., that this offer was not *bond fide* made. But even if it had been so, still, as the Subordinate Judge points out, it contains conditions with which the plaintiff was not bound to comply.

Nor do I think the plaintiff has waived his right to insist upon the second alternative of the *ikrar*. Although the negotiations with Mohamed Mirza were not commenced with the sanction of the plaintiff, and not always approved by his agent Mohesh, still, if the conduct of the defendants had been straightforward and fair towards the plaintiff, and if the matter had rested where it did on February 1870, it might, I think, in that case have been contended with some force that the plaintiff ought to have intimated, when he wrote the letter of the 3rd February 1870, that he intended to rely on his right to the higher rate of interest, if the *ijara* were granted to Mahomed Mirza. I think it quite possible that the plaintiff did not intend at that time to press his claims to the *ijara*, and that he was willing then to come to a fair settlement. But between the 3rd February 1870 and the 4th April 1870, it is quite clear that something had occurred, which satisfied the plaintiff that he could not rely upon the defendants. This is alluded to in the letter of Mohesh Chunder Biswas of the 3rd June, and no doubt led to the plaintiff's withdrawing his assent to the proposed arrangement, and giving notice to the defendants that he claimed the *ijara* by the several letters of the 4th and 11th of April. These letters were no doubt written to protect the plaintiff's interests, but I see no reason to suppose that they were otherwise than honestly written. The *ijara* was the plaintiff's only security; and though he might not be anxious to press his claim for it, he would naturally be anxious that it should not go out of his hands, unless his debt was in some way provided for. This claim on the part of the plaintiff, the defendants met by writing the letter of the 11th

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April. This letter is very peculiarly worded, and I feel it extremely difficult to put any certain construction upon it. It states that the plaintiff had entire charge and control of the property, which has been found to be false. It states that the plaintiff was under an obligation to render accounts, when the accounts had already been settled. It states that the plaintiff had expressed his unwillingness to take the *ijara*, when the fact was that the plaintiff had never done so, but had only declared his willingness to assent to any arrangement that might be to the defendants' advantage. It does not inform the plaintiff whether or no the defendants had broken off, at that time, their negotiation with Mahomed Mirza; and, in fact, I do not believe that they had done so; and it states that the defendants were ready under certain conditions to grant the *ijara*, which I do not think they ever intended to do. But whatever difficulty there may be in putting a construction upon such a document, this, at least, is clear, that the letter nowhere alludes to any waiver of the rights of the parties under the *ikrar*. It is throughout an assertion by the defendants of their intention to act strictly up to the *ikrar*, and it calls upon the plaintiff to do the same. The defendants nevertheless carried on their negotiations with Mahomed Mirza, and granted him the *ijara* a month or six weeks afterwards. There was, undoubtedly, great duplicity at this stage of the proceedings in the conduct of the defendants; and it is difficult to see exactly what their intentions were, though I am inclined to think they were influenced by a desire to get rid of the clause in the *ikrar* as to interest. But however this may be, I do not see how, after having written the letter of the 11th April, the defendants can now say that there had been a previous waiver by the plaintiff of his rights under the *ikrar*. Under these circumstances it seems to me that the plaintiff is fully entitled to say that the defendants have failed to grant the *ijara*, and that the clause entitling him to the higher rate of interest applies.

Supposing that clause to apply, the defendants further contend, first, that a stipulation for interest at 6-4 per mensem is not lawful; secondly, that, under Act IX of 1872, s. 74, the plaintiff is entitled only to a reasonable compensation for any loss he may have incurred; thirdly, that the stipulation for higher interest is

by way of penalty only, and not liquidated damages; and fourthly, that the agreement was extortionate and oppressive, and that the defendants ought to be relieved therefrom.

As to the first of these contentions, as far as I am aware, it has been the uniform practice of the Court, ever since Act XXVIII of 1855 was passed, to treat all restrictions on the rate of interest as removed; and that this is so, I should also infer from a Circular addressed by four Judges of this Court to the Mofussil Courts on the 30th April last (1), in which, whilst the duties of those Courts in relation to contracts at high rates of interest is elaborately discussed, there is no mention of any legal restriction.

If we look into the history of the matter, it is evident that, whatever legal restrictions there may have been at one time amongst either Hindus or Mahomedans, they had ceased to exist before we began to legislate at all upon the subject. It is recited in the Regulation of the 21st August 1772, s. 8, that "the rates of interest hitherto authorized by custom have amounted to the most exorbitant usury." And Mr. Harington considers that "the Hindu legislators have expressly sanctioned, and the Mussulman governments of India appear to have tolerated, directly or indirectly, the customary interest of the country"—1 Har. Anal., p. 182. And the explanation of the prohibition of Menu in vol. i, pp. 69, 70, and 74 of Jagannath's Digest, fully bear out this opinion as regards the Hindu law. I know, indeed, of only one expression of opinion in this Court that these restrictions still exist; and though, no doubt, that opinion is entitled to the very greatest respect, it has not been concurred in by any other Judge of this Court, and has been expressly dissented from by Phear, J. I believe I shall be adopting the law, as acted upon by this Court for a great number of years, by holding that there is not now any legal restriction on the rate of interest, and that parties may legally adopt any rate which they may think fit.

As to the second point, I do not think we need concern ourselves with the question whether Act IX of 1872, s. 74, applies to this

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(1) 11 B. L. R., H. C. Rules, 15.

provision referred to only applies where "a the contract as payable in case of a breach." I think that the stipulation which we have to consider is of this nature. This stipulation, in my opinion, does not amount to a breach of the *ikrar*, and for money payable in case of a breach, but for an alternative event which, however it should not be a breach of contract, but which would put the lender in a wholly different position; and this is what the law is intended to provide for. If the defendants did not give the stipulation, the plaintiff would have no security, and the transaction would be treated as an ordinary loan repayable at a certain interest.

I look upon this as a penalty. I quite agree with the view in the case of *Bichook Nath Panday v. Ram Chandra*, which has been referred to, that we must see what the intention of the parties was in entering into the stipulation. It is not a universal rule in all questions, which arise in relation to a contract. But *prima facie* the words used do not amount to a penalty for breach of contract, but to a stipulation for the use of money, and a compensation to the lender for the risk in lending the money; and as was said by Lord Macmillan in a case of *Herbert v. Salisbury and Yeovil Railway*, "it is not the high rate of interest which constitutes a penalty, but the stipulation that after a breach the interest shall be raised." What constitutes a penalty is raising the rate of interest after a breach. If a man agrees to take a loan of money at a certain interest for his money, but stipulates for a higher rate of interest if the contract is broken by not paying the interest, we should well understand that the higher rate of interest will be reduced in all cases in which a penalty is not payable.

But I do not think this view can be taken of the present case, as I have said, upon the construction of this *ikrar*, this was an alternative stipulation, to the effect that the lender would have no security, and would be exposed to a much greater risk; and the stipulation is not for a higher rate of interest in case of a breach, but, in a certain event, for the lender to run at a certain rate.

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The last ground was taken at so late a stage in the proceedings, and, when taken, was so indefinitely stated, that I have very great doubt, indeed, whether we ought to enter upon it at all. It was only said in argument on the appeal that the bargain was unconscionable, oppressive, extortionate, and so forth. But no such allegation was made in the written statements; nor was any such question raised in the Court below, nor in the grounds of appeal; and I do not think a party to a contract can get rid of it merely by such suggestions as these, made at this stage of the case after all the evidence has been closed. I think that, if a person desires to contend that a contract which he has signed does not bind him, he must state the reason why. As Mr. Woodroffe very strongly insisted, had such an allegation been made at the proper time, it might have been met by positive evidence that the defendants were fully aware of what they were doing, and that their consent was a perfectly free and intelligent consent to the terms of this arrangement. I think, to use the expression of the Circular above referred to, the person denying the contract must show circumstances from which it may be inferred that he has not been in reality a free agent in making the contract set up against him. I fully concur with the earlier observations in that Circular, that it is not the duty of the Court to assist persons in evading the consequences of engagements voluntarily and intelligently contracted. It was clearly, therefore, the duty of the defendants in this case to state and prove the circumstances connected with the entering into of this *ikrar* which affected their free agency; and I neither find in the printed book, nor have heard in the argument, any allusion to them beyond the vague statement of intimidation, which is wholly unsupported by evidence, and which is wholly disbelieved. In fact, up to this very moment, not one single member of the defendants' family has ventured to assert in any definite manner that he did not understand the nature of the arrangement, and that he did not think, when it was entered into, that it would be an advantageous one for himself. We are, in fact, asked simply to look at the contract, and say whether any reasonable man could assent to it. This is a question which, in most cases, I should feel scarcely in a position to attempt to answer. The

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terms were no doubt severe, but the risk was great; and it is quite possible that it may not turn out after all to be a very profitable transaction. If I felt at liberty to consider this question, I might perhaps be disposed to think that there is some ground for presuming that the terms were the best which the defendants were likely to get. One of the parties to the *ikrar*, Fatima Begum, when she authorized the execution of the *ikrar*, was living in her father's house; and there cannot be a doubt that holding the important judicial office he does, he is thoroughly capable of estimating the prudence of such an arrangement. I think it may fairly be inferred from Moulvie Abdool Lateef's evidence, and the terms of the mookhtarnama executed by Fatima Begum in his house, which set out in full the terms of the *ikrar*, that he was acquainted with the nature of the arrangement, and that he would not have omitted to oppose it, or, at least, to characterize it as unfair to his daughter and the other defendants, had he so considered it. At any rate, this shows that it must not be presumed too readily that the arrangement was oppressive; and had the defendants challenged the *ikrar* on this ground, this witness would have been certainly called upon to explain the circumstances under which he permitted his daughter to execute the mookhtarnama.

I fully concur in the opinion that the Courts in this country should take great care that they do not enforce oppressive transactions, to which the parties have not given a really free consent. But I am not prepared to set aside a contract which, as far as I can see, was deliberately consented to, merely because a very heavy risk is provided for by a very high rate of interest. I do not mean to say that such transactions are desirable, or should receive any favor. But I do not think they can, on this ground alone, be set aside as invalid: that would not be the application of any principle of equity, but a reintroduction, by judicial decision, of laws which have been expressly abolished by the Legislature. In this particular case I feel the less regret at being compelled to enforce such an agreement, because, as it seems to me, had the defendants themselves acted straightforwardly, they might have escaped this onerous condition altogether.

The decree which the Lower Court has given is, as I understand it, a decree against all the defendants, except Fatima Begum, jointly for Rs. 20,000 with interest at Rs. 6-4 per cent. per mensem from the date of the respective advances to the date of the Lower Court's decree, with costs and interest upon the total amount at 8 annas per cent. per mensem from the date of the decree until payment; the representatives of the original parties to the *ikrar* being only liable in their representative capacity. I certainly do not quite understand the grounds upon which Fatima Begum has been exempted from her share of the liability; but as both parties have acquiesced in that part of the Subordinate Judge's decision, it cannot now be disturbed. The decree of the Subordinate Judge ought, in my opinion, to be affirmed, except that, looking to the very large sum the plaintiff has already added to the principal in the way of interest, I think the interest on the amount decreed should be reduced to 6 per cent. In all other respects the appeal should be dismissed with costs.

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The Judges differing in opinion, the decision of Markby, J., as the senior Judge, prevailed, and from that decision the defendants preferred an appeal on the following grounds:—

“That the Judge was in error in holding that the stipulation to pay the higher rate of interest upon the event of the *ijara* not being executed is not a penal condition, and that as such it may be enforced;

“That the agreement was oppressive, unreasonable, and unconscionable, and was forced upon your petitioner in consequence of their pressing necessities. Such an agreement ought not both in law and equity to be enforced;

“That the plaintiff by his conduct and actions put an end to the *ikrar*, or, at any rate, waived his right to enforce the penal conditions of that deed; and there was nothing on the part of your petitioner by way of violation of the terms of the *ikrar*;

“That the plaintiff was entitled under law and equity to only a reasonable compensation for the use that your petitioners are said to have made of his money, and not to the exorbitant and penal interest which the Judge has allowed.”

1874 The *Advocate-General*, offg. (Mr. Paul) (Baboos *Kalimohun Doss* and *Chunder Madhub Ghose* with him) for the appellants.
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The *Advocate-General* contended that the Contract Act (IX of 1872) was retrospective and would govern this appeal, and in support of his contention he referred to s. 1 of the Act and the case of *The Ironsides* (1). The Court, however, intimated that they were of opinion that it was not retrospective, and the point was abandoned.

The contract is one which the Court will set aside as being unconscientious and oppressive, or, at least, that part of it relating to interest at 75 per cent., and will not allow interest at more than 18 per cent. as stipulated in the contract to be the rate payable on any balance remaining due at the end of the term—*Moonshiee Buzloor Ruheem v. Shumsoonnissa Begum* (2) and *Kedari v. Atmarambhat* (3). Act XXVIII of 1855, though it repeals the usury laws and says that the Court is bound to decree interest at the rate stipulated for by the parties, does not prevent a Court from setting aside the contract if it appears to be unfair and extortionate—*Vinayah Sadashiv Voze v. Raghi* (4). The same has been decided in England with regard to the usury law there; see *Earl of Aylesford v. Morris* (5). In that case actions on bills which stipulated for payment of interest at an exorbitant rate were restrained, and a decree made for delivering up of the bills on payment of the sum actually advanced with interest at 5 per cent. These cases show that where a necessitous man has entered into a contract under great pressure, and the circumstances show that advantage has been taken of his position to induce him to enter for an inadequate consideration into a contract, which he would not otherwise have agreed to, a Court of Equity will relieve him from the contract as being unconscionable; see the remarks

(1) 31 L. J., P. & M., 129.

(4) 4 Bom. H. C. Rep., A. C., 202.

(2) 11 Moore's I. A., 584.

(5) 8 L. R., Ch. App., 484.

(3) 3 Bom. H. C. Rep., A. C., 11;

see pp. 18 and 19; Colebrooke on Obligations, 67.

of V.-C. Stuart in *Barrett v. Hartley* (1). [COUCH, C.J.—In this case there was no obligation to enter into the contract. Can you point to any case where the Court in England has set aside a contract as being unconscionable, where the parties who seek relief were not obliged to enter into it?] Yes, *Grosvenor v. Sherratt* (2), where a lease was set aside, and it was held that to support the lease, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject, and independent and disinterested advice; and that the lease was intentionally and deliberately entered into: the lease was set aside, though it appeared there was no fraud. Here it is submitted the defendants were not free agents, but influenced by more experienced persons in whose hands they were. [COUCH, C.J.—There does not appear to have been any duress; then is the contract unconscionable?] It is submitted it is within the meaning of the cases cited.

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The stipulation for interest at 75 per cent. is a penalty which will not be enforced by the Court—*Bichook Nath Panday v. Ram Lochun Singh* (3). [COUCH, C.J.—The principle of that case would not apply to this; here there was a single act to be done, viz., the giving of the *ijara*, in doing which default was made.] It is submitted that interest should be given at a reasonable rate; see also *Boley Dobey v. Sideswar Rao Baboo Roy Kur* (4) and *Raja Hurbullubh Narain Singh v. Genda Maharaj* (5).

(1) L. R., 2 Eq., 789; at pp. 794-5. Baboo Abinash Chunder Banerjee for

(2) 28 Beav., 659.

(3) 11 B. L. R., 135.

(4) 4 B. L. R., App., 92.

(5) Before Mr. Justice Phear and
Mr. Justice Morris.

the appellant.

The respondent did not appear.

The judgment of the Court was
delivered by

The 11th July 1873.

RAJA HURBULLUBH NARAIN SINGH
(PLAINTIFF) v. GENDA MAHARAJ
(DEFENDANT).*

Interest, Rate of—Penalty—Liquidated
Damages.

PEAR, J.—In this case the zemindar seeks to recover from his *ticcadar* certain arrears of rent which he says are due to him under the terms of a *kabuliat*, together with interest, and to his plaint he attaches a schedule,

* Special Appeal, No. 751 of 1872, against the decree of the Judge of Zilla Bhaugulpore, dated the 12th February 1872, affirming the decree of the Munsif of Madhupora, dated the 31st August 1871.

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Mr. Kennedy for the respondent.—In this case it must be assumed that the Judges are right, except on points where they

which represents the arrears of rent unpaid to be Rs. 90, and the interest on the overdue instalments not paid, according to the *kabuliat*, Rs. 109 13 annas.

He bases his somewhat remarkable claim on this clause of the *kabuliat*,—"Further, that in default of a *kist*, that is, failing to pay the *malguzari* on the day fixed for (paying) instalments as per detail below, I shall pay the *zemindar's malguzari* with half as much again." And in the detail below, the annual *jama* is stated to be Rs. 725, payable in three *kists*; 4 annas on the 25th *Aswin*, 8 annas on the 30th *Paus*, and 4 annas on the 5th *Chaitra*.

Thus the part of the claim which in the plaint is denominated "interest," is in reality an increment of 50 per cent. added to the actual amount of rent reserved, according to the terms of the detailed schedule appended to the *kabuliat*, which only becomes due in the event of non-payment of an instalment on the particular day upon which the instalment was specified to be paid.

The defendant did not appear, and the Courts below have found that the plaintiff is only entitled to recover the Rs. 90, the actual amount of the instalment which was not paid, and that he is not entitled to recover the additional 50 per cent. on the amount which he claims.

The first Court has, however, given a small sum of Rs. 10 by way of interest, and the lower Appellate Court dismissed the appeal which was brought against that decision.

The claim is no doubt somewhat of a peculiar character, and belongs to a class of cases which depend on a

question of some nicety. I will give instances by way of illustration:

If a debtor becomes bound to pay a certain specified sum on a fixed day, and the creditor at the same time stipulates that he will accept a lesser sum as satisfaction of the debt, provided that it be paid punctually on that day, then, in the event of payment not being made punctually on that day, the creditor is afterwards entitled to claim the full amount of the debt. The debt was due from the commencement of the transaction, and the undertaking on the part of the creditor that he would accept a less sum in satisfaction of the whole if he be paid punctually, does not deprive him of his full right in the event of the less sum not being so paid.

Again, if a debtor becomes bound to pay a sum of money on a fixed day, and for any reasons which are known to the parties it will be a cause of loss to the creditor if the money is not paid on that day, and the parties at the time of making the contract further agree that that loss shall be measured by a stipulated amount in the shape of damages, then, in the event of default being made in punctual payment, the creditor will be entitled afterwards to recover the whole debt, together with the sum agreed upon, as liquidated damages. A third case will be one where the parties agree that the loss which may accrue to the creditor from the non-payment of the debt on the day fixed should be covered by interest on the debt running from that day with the time, at a fixed rate per cent.: in that event, if default in punctual payment occurs, the creditor can recover the debt plus the interest.

have differed; see *Roy Nandipat. Mahata v. Urquhart* (1). The case set up by the defendants has throughout been held to be wholly false. They raised the defence that the *ikrar* in suit

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A fourth illustration is the case where the creditor desires punctual payment of the debt and seeks to ensure it by stipulating that if the money is not paid on a certain day, a certain lesser sum shall become due, and that he shall be entitled to claim that sum afterwards. In the latter case the stipulation for the extra sum is received as a penalty, by the operation of which the creditor sought to secure punctual payment; and in such a case, if default in punctual payment occurs, a Court of Equity will relieve the debtor from the payment of the whole penalty, if it be shown that the loss which the delay in payment has caused to the creditor will be compensated for by a less sum. The Court of Equity considers that the creditor will get all that he ought to get from the stipulation for the penalty if he is repaid the reasonably estimated loss which non-punctual payment has caused him.

Therefore these illustrations will show that in all cases of this kind the first question which the Court has to ask is, does the stipulation for the extra payment bear the character of a penalty; or is it a sum which the parties, with their eyes open, have agreed is a fair and proper compensation to the creditor for want of punctuality in repayment?

If the latter, the creditor ought to be allowed to recover the full sum in its entirety. If the former, that is, simply a penalty, he ought only to recover so much as will place him in the same position as he would have been in if his debt had been punctually paid.

After giving our best consideration to this case which is before us, we think that it accords with the fourth illustration given. The 50 per cent. stipulated for in the clause of the *kabuliat* was very clearly of the nature of a penalty.

It bore no sort of relation to any actual or supposed loss which the *zemindar* might sustain from delay in the payment of the instalments. It was a penalty imposed on the *ticcadar* with a view to secure punctual payment of the *kists* reserved in the *potta*. This being so, the plaintiff is not entitled to recover the whole 50 per cent., but only so much as will fairly recompense him for his loss during the time that the money has been kept from him; and as nothing special is shown in this case, we think that that loss will be fairly met by interest at the ordinary rate. The plaintiff does not show what default or defaults were made out of which Rs. 90 accrued. It only states that Rs. 90 was the arrear for the year 1278, and the suit was brought by the *zemindar* in the following year.

It would thus appear that the Rs. 10 awarded by the first Court in addition to the Rs. 90 would very completely represent any sum to which the plaintiff is entitled as compensation for the non-payment of the Rs. 90, and therefore it seems to us that the decree of the first Court, which was affirmed by the lower Appellate Court, was in substance a right decree. Accordingly we dismiss this appeal, but without costs, as the respondent has not appeared.

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was forged, and that another *ikrar* of different date had been executed, a statement for which there was not the slightest foundation. All the issues of fact were found in favor of the plaintiff; and the defendants have abandoned their former defence, and now raise points which were not taken in the lower Courts, but are raised for the first time in the High Court on appeal.

It is submitted that this is not such a contract as the Court will set aside as being unconscionable, oppressive, or extortionate. The real ground on which Courts of Equity act in such cases is that they will allow no fraudulent transaction to stand. There must be fraud, or such circumstances as amount to constructive fraud; no mere inadequacy of consideration, where there has been no fraud, has been deemed a sufficient reason for setting aside a transaction—*Earl of Chesterfield v. Janssen* (1) and *New Brunswick and Canada Railway v. Conybeare* (2).

In ascertaining whether a sum mentioned in a contract as payable in default on performance of a certain act, is a penalty or liquidated damages, each case must be dealt with on its own facts, and by seeing what the contract really was; see *Bichook Nath Panday v. Ramlochun Singh* (3). Interest should be given at the rate stipulated for by the parties. Mere stipulation for payment of interest at a high rate is not a penalty.

Baboo *Kalimohun Doss* was heard in reply.

The judgment of the Court was delivered by

COUCH, C.J. (who, after shortly stating the facts, continued).—The nature of the transaction was this; the plaintiff agreed to advance money to the extent of Rs. 20,000, which it has been found that he did, and the defendants were to give him as a security for repayment of the money advanced, with interest at 18 per cent. per annum, the *ijara* for a term of ten years from the 1st of Baisakh 1277 (13th April 1870); one-fourth of the profits was to be taken by the plaintiff for the interest on the sum advanced, one-half of the remainder of the profits was to be

(1) 2 Ves. Sen. 125; see pp. 155 & (2) 9 H. L. C., 411; see p. 724.
156, per Hardwicke, L.C.

(3) 11 B. L. R., 135.

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would derive from it, was not capable of precise estimation. It was quite natural that the parties should agree to an estimate of it. And they did so; they agreed that, if the *ijara* was not given, the plaintiff should get, instead of it, interest at the rate of 75 per cent.; that is, in case of a breach of the contract they agreed to substitute for the benefits which would be given by the security interest at that rate. It cannot, as I remarked in the course of the argument, be called an alternative contract, because the plaintiff had a right to insist upon having the *ijara*, if he thought fit to do so, and he might, subject to the question as to whether it is a contract which could be enforced at all, claim a specific performance of it. It is an agreement, in the event of the breach in not giving the *ijara*, to give something else for it, this may have led Markby, J., to speak of it as an alternative contract. The effect of it is that it provides that the plaintiff, instead of compelling the defendants to give the *ijara*, may, if he thinks fit to do so, claim the interest at the higher rate. In that way and so far as he is concerned, it is alternative.

It has been held in various cases in the English Courts where this matter has been discussed, that the estimate of the damages being apparently excessive is not of itself conclusive that it was intended as a penalty. The Courts have said that, where the damages from the breach of a contract are uncertain, the parties themselves are at liberty to put their own valuation upon them, and the Courts have no standard by which they can pronounce them to be excessive. That seems to be a reasonable rule, and one which ought to be applied in this case. Here we cannot undertake to say that the parties did not consider that, looking at all the circumstances of the case, if the plaintiff lost the security of the property which he would have had by the *ijara*, it was fair to estimate the injury and the risk which he would incur of not recovering the money at all at the rate of interest which has been agreed to be paid. Therefore, considering the nature of the transaction that it was a provision to meet the case of the plaintiff being by the refusal of the defendants left with nothing but their mere personal security, and subject to the difficulty which a creditor so frequently meets with in India of recovering money from his debtor, there seems to be no reason

for thinking that, by the agreement for the 75 per cent. interest, the parties intended to do any thing more than to estimate what the plaintiff would be entitled to as damages. It does not appear that it was intended to be in the nature of a penalty, or as a security for payment of the much lower rate of interest, the 18 per cent.

We are not in trying this case bound by the English decisions; but the rules which have been adopted by the Courts in England may fairly be referred to. And there is nothing in the nature of the transaction, or in the rules which have been adopted by the English Courts, to lead us to the conclusion that this was intended by the parties to be anything more than an estimate by them of the compensation which the plaintiff was to have if he did not get his security by means of the *ijara*.

The question then which we shall have to consider is whether taking it to be a contract to pay interest at the rate of 75 per cent. as damages for the breach of the contract to give the *ijara*, it is of such a nature that the Court will consider it invalid.

Two questions are mixed together,—whether the contract to pay those damages is such as the Courts will allow to be enforced, and whether the contract to give the *ijara* for the breach of which the damages are to be paid is also such? Birch, J., has considered that it is not a contract which the Courts would enforce, on the ground apparently, that it is such an oppressive and unreasonable contract that it comes within those principles on which Courts decline to give effect to a contract.

The first observation that arises upon this ground of defence is that the defendants did not raise it in the first Court. They rested their defence upon an altogether different ground. The learned Advocate-General seems to admit that they were extremely ill-advised in putting forward the defence they did. They denied that the *ikrar* had been executed, and that an advance had been made. They charged fraud and forgery—forgery with regard to the document not having been executed, and fraud in a claim being made for advances which in fact were not made. But they did not allege that the *ikrar* was given under such circumstances that a Court of Equity ought to set it aside, or refuse to allow the plaintiff to recover upon it.

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Nor do they in the grounds of appeal to this Court make such a case as that. If the matter rested there, I think it would not be right to allow this question to be raised. Parties who have had the suit determined upon the questions which they thought fit to raise and to have determined by the first Court, are not entitled to make an altogether different case in the Court of Appeal and raise an altogether different defence. I say "not entitled," because I do not intend to say that there may not be cases in which the Court would allow it. But in this case it appears that, although the question was not raised in the first Court, nor in the grounds of appeal, the learned Judges allowed it to be argued. They refer to the question in their judgment, and I think we cannot treat it now as a question that was not tried, at least in the Appellate Court, namely, before Markby and Birch, JJ. We must therefore see whether upon the evidence in the suit there is a ground for such a defence.

The defendants certainly are not entitled now to give any additional evidence on this question, and they cannot complain of the Court deciding it upon such evidence as there is. The burden of proof was upon them. It being found that the *ikrar* was executed, it was for them to prove circumstances which made it proper for the Court not to enforce it, or which is the same thing to set it aside. In this case there is not that which is an important element in cases of this description where the deed is set aside—a relation between the parties which involves a confidence reposed by the person executing the deed in the person in whose favor it is executed. Here the plaintiff had no confidential or fiduciary relation with the defendants. They were apparently induced to go to him and to ask him to lend them money by their thinking that he possessed peculiar means of influence, peculiar means of assisting them in attaining the object for which they wanted the money. But there was no confidential relation between them. The plaintiff had not any connexion of that character with them.

As to information of the value of the property which was the subject of the transaction, it does not appear that the plaintiff had any peculiar means of information on that subject, or that he had any information at all that the defendants had not. The

defendants were the persons who would be likely to know most about the value of their property, and what they were agreeing to give as a security for the money which they were asking the plaintiff to lend. There is nothing in the case to show that the plaintiff had any information which the defendants did not possess, or that he gave them any information, or did any thing to induce them to enter into this agreement with him. So far there is nothing which can be said to make it a case of constructive fraud on the part of the plaintiff.

Then there is another fact in some of these cases which is very important,—namely, the capacity of the person entering into the contract. The Courts have in many cases considered the incapacity of the person entering into a contract, as a very important element in determining whether it ought to be enforced; such incapacity, as not being of age, or, in some cases, having just attained majority, and the case of females who have not proper advisers whom they might consult. Here there is nothing of that kind. It is true that some of the defendants were ladies, but they had every opportunity of consulting their friends on the subject, and it does not appear that the plaintiff in any way prevented it, or did any thing to lead them to act without taking proper advice. The probability is that they were advised by others in the matter, and there can be no ground for setting this deed aside in their case for the want of it. No circumstance is shown which would lead the Court to consider that this is a contract that ought not to be enforced, except what we can gather from the contract itself.

Then the question is, ought we in the absence of any of the facts to which I have alluded,—in the absence of any confidential relation between the parties, of any imposition or misrepresentation, or any want of capacity,—to say that this contract is of so hard or unreasonable a character that the Courts ought not to enforce it? There may be cases (there are few) in which a Court of Equity has refused to enforce a contract, or has set it aside on that ground. In the words of Lord Westbury in *Tennent v. Tennents* (1), “there is an equity which may be founded on

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(1) L. R., 2 Sc. Ap., 6; at p. 9.

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gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

The question then resolves itself into this, can this Court say that a contract to pay interest at the rate of 75 per cent. per annum, or to give a security for a loan which was considered as possibly of so much value that the plaintiff ought to be paid 75 per cent. interest if he did not get it, is one which the Courts ought to decline to enforce? If we were to say that, it would be in effect to say that the Courts will not enforce a contract to pay interest beyond a certain rate. I am unable to say what rate should be fixed. Looking at the risk in lending money, at the many circumstances which in different cases may induce a person about to borrow money to agree to give a very high rate of interest, benefits which he thinks he may obtain by borrowing the money in a particular quarter, considering all possible circumstances, I do not think the Court can undertake to say that a contract to pay interest at this rate is, without other facts being shown, so hard or unreasonable that it should be declared to be invalid. That is what this case is; for if the Court could not declare the contract to pay interest to be invalid, I do not think that we can say that the contract to give the *ijara*, for the breach of which interest at that rate was to be paid, is of itself a contract of such a nature that it is to be held to be invalid as being an unreasonable and oppressive one. The parties must have known very well that the plaintiff was expecting to get such a security for his advance, and that if he did not get it, he would not be willing to lend them the money unless he was to be paid interest at this rate. Upon this question then I think that the decree which is appealed from cannot be disturbed.

Birch, J., has also considered that there was what has been called a waiver of the performance of the contract, a waiver of giving the *ijara*, and that if the plaintiff had waived that, he would not be entitled to recover damages for a breach of the contract in not giving it.

This defence also was not raised in the first Court, nor in the

grounds of appeal; but like the other, it seems to have been raised in the argument of the case before Markby and Birch, J.J. But what is called a waiver, if it is to be an answer to the claim on the part of the plaintiff, must be not a waiver of the giving of the *ijara*, the plaintiff not intending to relieve the defendants from the liability to pay the damages if they did not give it, but a waiver or an abandonment of the entire contract. It does not appear to me that the plaintiff ever intended to or ever did make such a waiver or abandonment as that. He may have been willing that the defendants should pay him the higher rate of interest instead of giving the security. I think it would require very clear evidence to establish that the plaintiff, having a right to a security for his advance, or, if he did not have that, to be paid interest at 75 per cent. per annum, consented to give up that right, and to retain only the right to be paid interest at the rate of 18 per cent., without any security for even the payment of that. The letter which has been referred to as supporting the case of waiver is ambiguous. It does not state distinctly what the terms of the negotiations that it refers to were; and it is quite possible that this letter referred not to the *ijara* being given to Mirza Mahomed, but to what had been the subject of negotiations before, namely, to the defendants' receiving an *ijara* from him, which would make a great difference. The waiver or abandonment to be an answer to the present suit ought to be clearly proved. The defendants certainly, in my opinion, have not proved it; and they have so far the advantage that, if they originally intended to make out any case of that kind, they have given such evidence as they thought fit on the subject; without having either in their defence, or in their grounds of appeal given notice to the plaintiff that they intended to do so, so that the plaintiff might have met such a case by evidence on his part. I think this ground of defence also fails, and that the plaintiff is entitled to recover the principal sum and interest at 75 per cent. per annum, which has been awarded to him.

The appeal will be dismissed with costs.

Appeal dismissed.

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FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.

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SHAMCHAND KUNDU AND OTHERS (PLAINTIFFS) v. BROJONATH PAL
CHOWDHRY AND OTHERS (DEFENDANTS).*

*Under-tenure, Sale of—Act X of 1859, ss. 105, 106—"Tenure," Meaning of—
Regs. VII of 1799 & VIII of 1819—Beng. Act VIII of 1865, s. 6—
Non-registration.*

By the word "tenure," as used in s. 105, Act X of 1859, is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and it is the latter which is sold on a sale under s. 105.

Therefore, where *A*, at a sale in execution of a decree for debt, bought the right, title, and interest of the holder of a transferable under-tenure, and previous to the confirmation of such sale, the zemindar sued the tenant for arrears of rent, and obtained a decree under which he sold the tenure to persons who conveyed it to *B*, and *A* under the circumstances neither registered the transfer to himself, nor made any deposit of rent as allowed by s. 6, Beng. Act VIII of 1865,—*Held*, that he was not entitled to recover possession from *B*.

THE plaintiffs in this case purchased on the 19th February 1866, at a sale in execution of a decree for debt, the right, title, and interest of one Brojonath Pal and others in a certain *jote*, which was admitted to be a transferable under-tenure. The sale was not confirmed, and therefore did not become absolute and final, until the 23rd June. Meanwhile, on the 6th March, the zemindar sued the *jotedars*, whose rights had been sold, for arrears of rent, and having recovered a decree against them caused the tenure to be put up for sale, and it was sold accordingly on the 4th of June, that is to say, nineteen days before the confirmation of the sale to the plaintiffs. The purchaser was one Kedarnath, who afterwards conveyed his rights to

* Special Appeal, No. 1525 of 1872, against the decree of the Officiating Judge of Zilla Dacca, dated the 29th June 1872, reversing the decree of the Subordinate Judge of that district, dated the 21st December 1871.

Menoka Dossee, one of the defendants. Under these circumstances the transfer to the plaintiffs was not registered, neither did the plaintiffs make any deposit of the rent due as allowed by s. 6, Beng. Act VIII of 1865. In a suit by the plaintiffs to confirm their rights to the *jote*, the Court of first instance gave them a decree for possession, but this decree was reversed by the lower Appellate Court, and the plaintiffs then appealed to the High Court.

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In consequence of a conflict of decisions, Jackson and Birch, JJ., who heard the appeal, referred for the opinion of a Full Bench the question—"Are the plaintiffs entitled to possession of the *jote*, notwithstanding the sale of it in the rent suit?"

The decisions mentioned by the learned Judges in the referring order were, on the side of the plaintiffs, *Pran Bandhu Sirkar v. Sarbasundari Debi* (1), *Ram Baksh Chatlangi v. Hriday Mani Debi* (2), *Tirthanund Thakoor v. Paresmon Jha* (3), *Samiraddi Khalifa v. Harischandra* (4), *Dowlut Gazi Chowdhry v. Moonshee Munwar* (5),

(1) 3 B. L. R., A. C., 52 note.

(2) 8 B. L. R., 10 note.

(3) 10 B. L. R., 142 note.

(4) 3 B. L. R., A. C., 49.

(5) *Before Mr. Justice Macpherson and Mr. Justice Mookerjee.*

The 4th April 1871.

DOWLUT GAZI CHOWDHRY AND ANOTHER (PLAINTIFFS) v. MOONSHEE MUNWAR AND ANOTHER (TWO OF THE DEFENDANTS).*

Under-tenure, Sale of—Act X of 1859, s. 5.

Baboo Srinath Doss and Kali Kishen Sen, on behalf of Baboo Gopal Lal Mitter, for the appellants.

Baboo Nullit Chunder Sen and Kashi Kant Sen for the respondents.

The following judgments were delivered:—

MACPHERSON, J.—This is a suit for possession of, and declaration of title to, a 7-anna share of a certain small talook, numbered 53, and registered in the names of Mushruffooddeen and Shujatooddeen, who were originally the proprietors of it.

In 1270, in execution of a decree of a Civil Court against Mushruffooddeen and Shujatooddeen, the talook was attached and sold. At the sale it was purchased in the name of a third party by the plaintiff, Kurram-unissa and the defendant Manik Bibi, each of these women having an 8-anna share in the purchase. In 1274, Manik Bibi's 8-anna share was purchased by the plaintiff Dowlut Gazi Chowdhry at a sale held in execution of a decree of a Civil Court against Manik Bibi. No

* Special Appeal, No. 1298 of 1870, against the decree of the Judge of Zilla Tipperah, dated the 7th April 1870,* reversing a decree of the Munsif of Begumgunge, dated the 19th August 1869.

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mutation of names was ever made in the books of the zemindar; but rent for the 7-anna share, which is the subject of this suit, was received for 1271-72 from Kurrumunissa and Manik Bibi, who, in the receipt granted to them, are described as the auction-purchasers.

Subsequent to the purchase by Dowlut Gazi Chowdhry, the holder of the 7-anna share of the talook instituted a suit under Act X of 1859 for the rent of 1273-74. This suit was not against Kurrumunissa and Dowlut Gazi Chowdhry (the persons really interested in the matter), but against the original recorded proprietors Mushruffooddeen, and Shujatooddeen and against Manik Bibi, no one of whom any longer had anything to do with the property. An *ex parte* decree was obtained; a 7-anna share in the talook was sold in execution of it; and, at the sale, the defendant Amjad Ali was the purchaser. Amjad has since been put in possession by the Court.

The plaintiffs then sued. In their plaint they allege the suit under which the defendant Amjad Ali purchased to be fraudulent as against them, and pray that the sale may therefore be set aside, &c. The Munsif gave them the decree they sought, finding that the fraud alleged was proved.

The lower Appellate Court held that no fraud was proved, reversed the decree of the Munsif, and dismissed the suit. Before the lower Appellate Court it was urged, on behalf of the plaintiff, that, even if fraud were not proved, they were entitled to succeed, as Amjad Ali had in fact bought nothing, the persons against whom the decree (under which he purchased) had been obtained having,

at the time of the decree and sale, no interest whatever in the tenure. As to this the Judge says:—"But in this suit there is no question of what was sold or bought, the only question being whether there was any fraud in putting up the talook to sale, &c."

In special appeal, it is contended before us that the lower Appellate Court was wrong in refusing to consider the question of what was sold or bought, and in holding that the suit necessarily failed if the fraud alleged were not proved.

It appears to me that the appellants are entitled to our judgment, and that the decree of the lower Appellate Court should be reversed. On the face of the transaction, there is strong evidence in support of the allegation of fraud which is made in the plaint and it is not much to be wondered at if the other question, as to whether anything passed by the sale to Amjad Ali, was not specially put forward. When the Judge reversed the Munsif's finding as to fraud, I think he should have decided the question as to whether Amjad Ali purchased anything, which question was then raised distinctly, and for the decision of which there were ample materials upon record.

I am of opinion that, under s. 105 of Act X of 1859, the Court has power only to seize and sell that which at the time is the property of the judgment-debtor; see *Pran Bandhu Sirkar v. Sarbasundari Debi* (a) and *Ram Baksh Chailangi v. Hriday Mani Debi* (b). The decree under which Amjad Ali purchased was against persons who at the time had no interest in the tenure which was sold, and nothing therefore passed to him.

The decision of the lower Appellate

(a) 8 B. L. R., A. C., 52 note.

(b) 8 B. L. R., 10 note.

Forbes v. Lutchemput Singh (1) and *Wahed Ali v. Sadiq Ali* (2); and on the side of the defendants—*Khoobaree* 1878

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Court is reversed, and the decree of the Munsif is restored and affirmed. The appellants are entitled to their costs in all the Courts.

Baboo *Kashi Kant Sen* for the respondent.

THE judgment of the Court was delivered by

MOOKERJEE, J.—I concur. I also think that the Judge ought to have tried the point distinctly raised before him as to the respective rights of the parties under their purchase. I find from the sale certificate of the defendant that he merely purchased the right, title, and interest of the old proprietors of this *jote*, who had no title at all at the time of the decree or the sale; whatever right and title those persons possessed had completely passed to the plaintiff in a previous execution-sale. The defendant therefore purchased nothing. The right of the plaintiff must, therefore, I apprehend, prevail over that of the defendant. I would therefore allow this appeal with all costs.

MACPHERSON, J.—It appears to me that the decree of the lower Appellate Court ought to be reversed, and that the plaintiff's suit ought to be dismissed.

The plaintiff makes his title under a purchase made at a sale in execution of a rent decree (under Act X. of 1859), which had been obtained against Makbul Ali, but it appears that, prior to the date of the decree under which that sale took place, the tenure had been sold to Wahed Ali. That being the case, the tenure was not the property of Makbul Ali at the time of the decree, or of the subsequent attachment and sale, and the plaintiff who purchased at the sale simply took nothing.

Following the decisions in the cases of *Fran Bandhu Sirkar v. Sarbasundari Debi* (a), *Ram Baksh Chatlangi v. Hrudoy Mani Debi* (b), and *Dowlut Gazi Chowdhry v. Moonshi Munwar* (c), we hold that the decree under which the plaintiff purchased was against a person who at the time had no interest in the tenure which was sold in execution of that decree, and therefore that nothing passed to the plaintiff. The decree of the lower Court is reversed, and the suit is dismissed with costs.

(1) 10 B. L. R., 139.

(2) *Before Mr. Justice Macpherson and Mr. Justice Mitter.*

The 15th March 1872.

WAHED ALI (ONE OF THE DEFENDANTS) v. SADIQ ALI (PLAINTIFF).*

Under-tenure, Sale of—Act X of 1859, s. 105.

Baboo *Umbica Churn Bose* for the appellant.

* Special Appeal, No. 757 of 1871, against the decree of the Subordinate Judge of Zilla Chittagong, dated the 18th April 1871, affirming the decree of the Munsif of Bagayu, dated the 19th September 1871.

(a) 8 B. L. R., A. C., 52 note.

(b) 8 B. L. R., 10 note.

(c) *Ante*, p. 485.

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Rai v. Roghoobur Rai (1) and *Gopal Mundul v. Soobhudra Bistobee* (2), the Full Bench Ruling in *Sheikh Afzal Ali v. Lala Gaurnarayan* (3), (which, however, as their Lordships observed, did not appear to bear directly on the point), *Doorga Persad Bose v. Sreekisto Munshee* (4), *Sadhan Chandra Bose v. Guru Charan Bose* (5), *Grish Chunder Mitter v. Sheikh Jhaku* (6), and *Anundlall Mooharjee v. Khalika Persad Misser* (7).

(1) 2 W. R., 131.

(2) 5 W. R., 205.

(3) B. L. R., Sup. Vol., 519.

(4) W. R., Jan. to July 1864,
Act X Rul., 48.

(5) 8 B. L. R., 6 note.

(6) *Before Mr. Justice L. S. Jackson
and Mr. Justice Mitter.*

The 22nd February 1872.

GRISH CHUNDER MITTER (PLAINTIFF)
v. SHEIKH JHAKU, *alias* ABDUR
RUHOMAN, AND ANOTHER (DEPEND-
ANTS), AND MODHUSUDUN MITTER
(INTERVENOR).*

*Under-tenure, Sale of—Act X of
1859, ss. 106, and 108 to 110*

Baboo Tarucknath Dutt for the
appellant.

Baboo Bhowani Churn Dutt for the
intervenor.

Baboo Oopendro Chunder Bose for
the other respondents.

The judgment of the Court was
delivered by

JACKSON, J.—This was a suit for
rent brought by Grish Chunder Mitter
against Abdur Ruhoman and another.

The plaintiff alleged that these
defendants occupied two and a half
bigas of land in the village of Kat-
pore Alipnugger, within a tenure

formerly held by Khettermohun
Bose, which tenure the plaintiff alleged
that he had purchased in execution
of a decree of the Civil Court.

The defendants denied that they
were liable to pay any rent to the plaintiff, and in accordance with this answer of theirs, one Modhusudun Mitter intervened and procured himself to be made a party to the suit, alleging that, subsequent to the alleged purchase by the plaintiff, he himself had bought the tenure in question at a sale by order of the Revenue Court in execution of a decree for arrears of rent.

The Munsif who tried the suit gave the plaintiff a decree.

That decision has been reversed by the Judge, who holds that, notwithstanding the prior sale in execution of a Civil Court decree, the sale by order of the Revenue Court passed the whole tenure, and that consequently the intervenor, and not the plaintiff, had got the tenure, and was entitled to the rents.

Several grounds of appeal have been raised, and one of them is that which directly traverses the principal and sole ground of the Judge's decision, namely, that the sale by the Civil Court was a valid sale, and that

(7) See next page.

* Special Appeal, No. 1247 of 1871, against the decree of the Judge of Zilla 24-Per-
gunnas, dated the 27th June 1871, reversing the decree of the Munsif of Alipore,
dated the 18th August 1870.

Baboos Chunder Madhub Ghose, Bungshi Dhur Sen, and Juggut Doorlubb Bysack for the appellants.

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the subsequent purchaser at the sale in the Revenue Court took nothing, the rights of the outgoing tenant having previously passed to the purchaser at the Civil Court sale.

There seems to be something in the nature of a conflict of decisions on this point, and if we were obliged to decide the case on that point, it might have been necessary to refer the case to a Full Bench. But I think we are not under that necessity, because one point, on which the decision of the Munsif rests, and which has not been noticed by the Judge, appears to be sufficient to dispose of the case. It turns out that the purchase by the intervenor in the Revenue Court took place upon a decree for rent obtained at the instance of the intervenor himself, who sued in that Court as the *ijaradar* and *locum tenens*, not of the sole owner, or the whole body of owners, but of the owner of a fractional share of the estate. That being so, it comes within the provisions of ss. 108 to 110, Act X of 1859, and the sale in question was not that of the tenure, but of the rights and interests of the holder of it as if in an ordinary Civil Court execution.

This seems to dispose of the whole case, and upon that ground, I think, the intervenor's claim failed; and that the plaintiff was undoubtedly entitled to the rent. I think, therefore, that the judgment of the lower Appellate Court must be set aside, and that of the Munsif restored with costs.

(7) *Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Glover.*

The 18th May 1878.

ANUNDLALL MOOKERJEE, SON OF BHUGWAN CHUNDER MOOKERJEE, DECEASED (DEFENDANT) v. KHALIKA PERSAD MISSER & OTHERS (PLAINTIFFS).*

Under-tenure, Sale of—Act X of 1859, ss. 105 & 106—Irregularity—Stay of Sale—Beng. Act VI of 1865, ss. 6 & 13.

Baboos Ashootosh Dhur and Romesh Chunder Mitter for the appellant.

Baboo Kali Mohun Dass for the respondents.

THE judgment of the Court was delivered by

COUCH, C.J.—The Judge has found that the sale was not a fraudulent one. Therefore, we are not to consider the case as a suit brought by a third person, or a person not a party to the suit in which the sale was made, for setting it aside on the ground of fraud. We shall have to see whether it can be entertained as a suit to set aside the sale on account of irregularity in it.

A decree had been obtained for an arrear of rent due in respect of the under-tenure. The defendant in that suit was the person whom the zemindar had a right to suppose was the tenant. Beng. Act VIII of 1865 provides for the manner in which a sale shall be made under a decree of

* Special Appeal, No. 911 of 1872, against the decree of the Judge of Zilla Jessore, dated the 27th March 1872, modifying a decree of the Subordinate Judge of that district, dated the 18th December 1870.

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that kind, and s. 6 says that, if the sum due under the decree is paid into Court at any time before the sale commences, either by the defaulting holder of the under-tenure, or any one on his behalf, or any one interested in the protection of the under-tenure, the sale shall not take place. The present plaintiff might have stopped the sale by paying the sum due under the decree into Court. Although his transfer was not registered, he was a person interested in the protection of the under-tenure, and entitled to do that. The money was not paid into Court, and, therefore, there is no ground in law for saying that the sale was improper or irregular on account of the payment of the money to the naib of the zemindar. The person who wished to stop the sale ought to have taken the proceedings directed by the law. The only irregularity which the law could take notice of in these proceedings was that the sale was not held at the place named in the notification. That, no doubt, was an irregularity, but the Judge finds—and he is the proper authority to come to a finding upon that matter—that the changing of the place of sale did not cause any deficiency of bidders, and in that way, injuriously affect the owners of the property that was sold. He considered that it did operate injuriously, because, as he says, if the place had not been changed, the money would have been received in time to stop the sale, and so the sale would have been stopped. But that is not a ground of injury that can be taken notice of; for the money was not paid

in the only way which would authorize the stopping of the sale, and until the money was paid into Court, the authorities ought not to have taken notice of it. The law has provided, and I think wisely, that, in order to stop the sale, the sum due under the decree shall be paid into Court. This provision seems to have been made to prevent any question being raised upon the doubtful and untrustworthy testimony of witnesses, whether the money had been paid to a naib or mookhtar of the zemindar, or any other person. In fact, according to the finding of the Judge, there was not an irregularity which injuriously affected the parties so as to be a ground for setting aside the sale.

The law has said what shall be done in the case of an irregularity of this description in sales. S. 13 of Beng. Act VIII of 1865 says that an appeal is to lie to the Collector from any proceedings of a Deputy Collector, if made within fifteen days, and then it says that “no proceedings under this Act shall be reversed or modified on appeal, except upon the ground of irrelevancy of the law, or of such an irregularity in procedure as, in the opinion of the appellate authority, has caused injury to the interests of one of the parties to the suit in which the decree was passed.” Here no ground is shown upon which this sale could have been set aside, if this course had been taken.

Then, should the present plaintiff be in a better position for setting aside this sale for irregularity than the person against whom the decree was made would have been? There

Baboo Chunder Madhub Ghose for the appellants.—The sale for arrears of rent took place under s. 105, Act X of 1859; but at the time of the Collector's decree under which that sale took place, the rights of the *jotedars* had already passed to the appellants. On confirmation of the sale to them, the appellant's title related back to the date of sale, *i.e.*, the 19th February. [KEMP, J.—It is the certificate which passes the right. COUCH, C.J.—Till confirmation there is a good contract of sale, but it is merely a contract.] Yes; but when the sale has been confirmed, the title dates from the date of the contract. The zemindar's right to sell under s. 105, Act X of 1859, is limited to cases in which the tenure

is no ground upon which he can be in a better position, and be entitled to complain of anything as an irregularity which the other would not have been entitled to complain of. S. 106 of Act X of 1859 expressly says that "no transfer of an under-tenure which, by the provisions of this Act, or any other law for the time being in force, is required to be registered in the *sarrishda* of the zemindar or superior tenant, shall be recognized unless it shall have been so registered." That proviso applies to s. 105. These two sections are to be taken together. S. 105 provides for the sale of transferable tenures; and s. 106 for a person to whom a tenure has been transferred, putting in a claim that it may not be sold in execution of a decree against another person. Where a decree has been obtained against the tenant who was known to the zemindar, it enables the transferee to come in and allege that the person against whom the decree has been obtained was not the proprietor of the under-tenure, and was not in lawful possession. But then it provides that no transfer shall be recognized for any such purpose unless it has been registered. It may be that for other purposes, the transfer would operate; it would operate between the person

making it and the person to whom it is made; but until it has been registered, the zemindar is entitled to treat the transferor as his tenant, as the person liable to be sued for the rent and against whom the decree is properly obtained. Where the transfer has not been registered, all that the transferee can do is to stop the sale under s. 6 of Beng. Act VIII of 1865, by paying the money into Court, or if there has been an irregularity of which the defendant in the rent-suit could complain, and by appealing have the sale set aside on account of it, the transferee may be able to do the same. He is in the same position as the transferor, and is not entitled to go beyond that where there has been no fraud.

I think this suit to set aside the sale cannot be maintained, because no irregularity has been shown which caused injury to the interests of one of the parties to the suit in which the decree was passed.

The decree which has been appealed from must be reversed, and the decree of the first Court in which a proper view of the case seems to have been taken will stand. The appellant will have the costs of this appeal and of the appeal to the lower Court.

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remains in the hands of the defaulter—*Pran Bandhu Sirkar v. Sarbasundari Debi* (1), *Ram Baksh Chatlangi v. Hridoy Mani Debi* (2); *Tirthanund Thakoor v. Paresmon Jha* (3), and *Sami-dirad Khalifa v. Harischandra* (4). [KEMP, J.—That was a decision by Loch and Mitter, JJ., and it is directly in conflict with a previous decision of the same learned Judges in *Mussamut Sufuroonissa v. Saree Dhoopee* (5).] The two cases are distinguished by Loch, J.; *Sheikh Afzal Ali v. Lala Gaurnarayan* (6) and *Dowlut Gazi Chowdhry v. Moonshee Munwar* (7) are to the same effect. [COUCH, C.J.—There, according to Mookerjee, J., the defendant merely purchased the right, title, and interest of former proprietors which were nil, here the tenure itself was sold.] In *Forbes v. Lutchemput Singh* (8), the Privy Council appear to adopt the view expressed in *Tirthanund Thakoor v. Paresmon Jha* (3); and see also *Mojon Mollo v. Dula Gazi Kulan* (9). This view is further confirmed by

(1) 3 B. L. R., A. C., 52 note.

(2) 8 B. L. R., 10 note.

(3) 10 B. L. R., 142 note.

(4) 3 B. L. R., A. C., 49.

(5) 8 W. R., 384.

(6) B. L. R., Sup. Vol., 519.

(7) *Ante*, p. 485.

(8) 10 B. L. R., 139.

(9) *Before Mr. Justice L. S. Jackson and Mr. Justice Miller.*

Baboo Bungshi Dhur Sen for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—The decision of the lower Appellate Court in this case indicates an entire inability to grasp the real facts and questions arising upon these facts as they ought to have been grasped. The plaintiff purchased an *istemrari jote*, that is to say, the right, title, and interest of the tenant therein in August 1866 at a sale in execution of a Civil Court decree. This is unquestionable. It is also alleged, and there appears to be really no reason to doubt, that in pursuance of that purchase the plaintiff went to the zemindar and received from him a potta, which potta the plaintiff sought to register according to law. The zemindar appeared in the Regis-

The 25th February 1873.

MOJON MOLLO (PLAINTIFF) v. DULA
 GAZI KULAN AND ANOTHER (DEFEND-
 ANTS).*

Under-tenure, Sale of—Act X of 1859, s. 105—Fraud—Registration Act (XX of 1866), s. 36—Refusal to register.

Baboo Hurry Mohun Chuckerbutty and Aukhil Chunder Sen for the appellants.

* Special Appeal, No. 241 of 1872, against the decree of the Additional Judge of Zilla Chittagong, dated the 9th October 1871, reversing a decree of the Munsif of Chowky Raogan, dated the 9th May 1871.

the provision at the close of s. 105 enabling a zemindar who has failed to realize the full amount of the arrears by a sale of

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try office, and there admitted the execution of the potta, but did not assent to its being registered, whereupon the Registering Officer (why I do not know) withheld registration. Under s. 36 of the Registration Act, it appears to us that, on the Registering Officer enquiring whether or not the document was executed by the person by whom it purports to have been executed, if such person admits the execution of the document, the plain duty of the Registering Officer is to register the document whether the executant asks or consents to it or not. The plaintiff, no doubt, if well advised, ought to have made proper application to enforce registration, but he did not. After this the zemindar brought a suit for arrears of rent against the tenant who had been sold out, which suit was undefended, a decree was passed, the tenure was put up to sale, and purchased by the zemindar himself for Rs. 2. The zemindar then applied to the Collector to put him in possession, which was done notwithstanding the protest of the plaintiff. The plaintiff, therefore, brings this suit to be restored to possession.

The Court of first instance found that the zemindar's conduct was tainted with fraud, and gave the plaintiff a decree: that decree has been reversed by the Additional Judge upon very insufficient reasons. The Judge says:—"The plaintiff's potta is inadmissible as evidence, and I cannot but think that probability lies on the side of want of genuineness in the *dakhilas*. I am certainly unable to determine that the plaintiff has, since his auction-purchase in 1866, paid rent to the zemindar defendant. The

landlord not getting his rents had a right to look to the occupier of his land and to the land itself as his security, and the plaintiff, when his potta was refused registration, had his full opportunity to have that registration enforced, if it was his right." The Judge altogether overlooks the fact that the zemindar well knew that the plaintiff had acquired the tenure by purchase. Notwithstanding that knowledge, three years afterwards, he brought a suit for arrears of rent against a person whose interests he knew had become extinguished, and obtained the sale of the tenure, on the strength of an *ex parte* decree against such person. If it were necessary to decide the case on that point alone, it would be sufficient to say that the zemindar, by such subsequent purchase in execution of a decree against a sold-out tenant, had taken nothing, and was bound to give way to a *bona fide* purchaser like the plaintiff. More than that, under the circumstances of the case, it is quite clear that the conduct of the zemindar is tainted with fraud. He is made aware of the plaintiff's purchase, he actually executes a potta in plaintiff's favor, goes to the Registrar's office to register the document, and there declines to register it. He then tries to avoid his own act, and ignoring the plaintiff brings a suit against a party whose rights he knows to be non-existent. Under such circumstances if the sale under the rent decree had any validity, and could prevail over the previous purchase made by plaintiff, it would have been the duty of the Court to order the zemindar to reconvey the tenure to the plaintiff, but as I have already stated that is unnecessary as the zemindar took nothing by his

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the tenure, to proceed against "any other property belonging to the debtor." [PONTIFEX, J.—The effect of such a construction would be that the tenant, by transferring the tenure before sale by the zemindar, could altogether get rid of his liability for the arrears; because the zemindar's right to proceed against the "other property" does not arise until "after the sale of the tenure." COUCH, C.J.—S. 105 does not say the tenure is to be sold "as the property of the tenant." In many cases the tenure is the zemindar's only security.] The plaintiffs can bring a civil suit to set aside the sale of the tenure—*Gunga Doss Dutt v. Ramnarain Ghose* (1). [COUCH, C.J.—There fraud was alleged. The question here is whether the plaintiffs can bring this suit before the transfer to them is registered. They might have stayed the sale under the rent decree by depositing the amount due.] They were not interested in the protection of the tenure; see *Ram Baksh Chatlangi v. Hridoy Mani Debi* (2). The cases mentioned in the referring order, as supporting the defendant's view, are opposed to the decision of the Privy Council in *Forbes v. Lutchmeput Singh* (3).

Baboo *Kali Mohun Doss* for the respondents.—In all the cases before the case of *Pran Bandhu Sirkar v. Sarbasundari Debi* (4), it was held that the zemindar could follow the land so long as the defaulting tenant remained on the register. That case proceeded on a misconstruction of the words "other property" in s. 105, Act X of 1859.

At this point he was stopped by the Court: but no reply was made on behalf of the appellants.

The following judgments were delivered by the Full Bench:—

GOUCH, C.J. (KEMP, GLOVER, AND PONTIFEX, JJ., concurring).—The decision of the present question depends in my opinion upon the construction which is to be put upon ss. 105 and 106 of Act X of 1859. Those sections I think must be

purchase. The judgment of the lower Appellate Court is overruled, and that of the first Court is restored with all costs.

(1) B. L. R., Sup. Vol., 625.

(2) 8 B. L. R., 10 note.

(3) 10 B. L. R., 139.

(4) 3 B. L. R., A. C., 52 note.

read together, forming as they do a provision for the sale of transferable tenures in execution of decrees for arrears of rent.

S. 105 says that, if there is a decree "for arrears of rent due in respect of an under-tenure which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force."

By tenure is meant, not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and giving to the word its plain and ordinary meaning, it is that which is to be sold. If this had not been intended, and the person who obtained a decree for rent was to be only entitled to sell the right and interest of the person against whom the decree was obtained, it would not have been necessary to make the provision in this section, as the decree might be executed upon all his property in the same manner as any other decree. It seems to me that, by providing that the tenure shall be sold, more was meant than selling what is the property of the person against whom the decree had been obtained. And the words "according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," may assist us in coming to this conclusion. The rent is not regarded as due from the person against whom the decree is obtained, but as due in respect of the tenure.

The words in the latter part of the section, "other property," do not appear to me to limit the meaning of the first part. In many, if not in most, cases, the tenure would be the property of the person against whom the decree is obtained, and then the words "other property, moveable or immoveable, belonging to the judgment-debtor" would not be inappropriate. I think it would be giving too great an effect to the words "other property" to say that they show that the intention of the Legislature was not that the whole of the tenure should be sold, but only the right and interest of the judgment-debtor in it. When we compare the words of Act X with those of the Regulation

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which was repealed by it, and for which the provisions in Act X were substituted, it seems that some alteration of the law was intended; Act X professes to be an Act to amend the law, and not merely a consolidating Act. Many provisions in the Regulation are repealed, and others are substituted for them. The part of the 7th clause of s. 15 of Regulation VII of 1799, which would be applicable to the present question, says:—"If the defaulter be a dependent talookdar, or the holder of any other tenure which by the title-deeds, or established usage of the country, is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut, in satisfaction of the arrear of rent." This authorizes the sale where the defaulter, the person against whom a decree might be obtained, is the holder of the tenure. The Judicial Committee of the Privy Council, in the case of *Forbes v. Lutchmeput Singh* (1), allude to these words, and consider that they are very material as to what cases were within the Regulation. They say:—"They were not the holders of any tenure, to use the words of Regulation VII of 1799, and were certainly not 'proprietors' in the words of the Regulation VIII of 1819." In Act X, words which are capable of a much wider meaning are substituted for the words of the Regulation. The Act says generally that, if there is a decree for arrears of rent, the tenure may be sold. There are no words limiting it to a decree obtained against the person who is at the time the holder of the tenure.

There is another difference between the Act and the Regulation which shows that it was the intention of the Legislature to give to the zemindars a more effectual remedy than they possessed before. The 8th clause of s. 15 of the Regulation directs that transfers shall be registered. "As a further security to the zemindars in maintaining their rights over the dependent talookdars continued under them, the latter are hereby required to register in the sudder cutcherry of the zemindari to which their talooks may be attached, all transfers of such talooks or portions of them, by sale, gift, or otherwise, as well as all successions thereto and divisions among heirs in cases of inherit-

(1) 10 B. L. R., 139; at p. 152.

ance." But it does not provide, as Act X does in the proviso to s. 106, that no transfer which is required to be registered shall be recognized unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. More stringent provisions in favor of zemindars are inserted in Act X of 1859 than in the Regulation. It appears to me, taking ss. 105 and 106 together with the proviso, that it was intended that the zemindar should be at liberty to treat as the holder of the tenure and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration. In such a case a zemindar might find that he had been suing the wrong person. Taking these sections together, I think that the zemindar, having obtained a decree for arrears of rent, is entitled to sell the tenure; and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for not registering, is bound by the sale, and cannot set up a title which he has acquired by a previous sale.

S. 106 appears to provide for cases where the zemindar has sued the wrong person. The real proprietor may come in upon the condition of depositing the amount of the decree, and may show that he was the owner of the tenure, and should have been sued. That is a wholesome provision, for a suit might be brought collusively, and a decree for the arrears of rent might be obtained, and the tenure be sold without the real proprietor being able to show that in fact the arrears claimed were not due.

The opinion that I now state, and which I stated in a former case (1) when I sat with Glover, J., is in accordance with the earlier decisions of this Court. And in the conflict of opinion which there is amongst the learned Judges of this Court, it is satisfactory for me to find that in the earlier cases the same was decided as I now propose that we should decide.

In the case of *Gunga Doss Dutt v. Ramnarain Ghose* (2), which is a Full Bench Ruling, the late learned Chief Justice, no doubt,

(1) See *Anundall Mookerjee v. Khalika Persad Misser*, ante, p. 489.

(2) B. L. R., Sup. Vol., 625.

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appears to have expressed an opinion contrary to this; but it does not seem to me that the decision there was upon the question which is now before us. The cases in this Court in which the question had been decided were not referred to in that case, and were not in any way the ground of the reference to the Full Bench. From this I conclude that it was not then intended to refer the present question. What was referred was the question as to incumbrances, although no doubt the Chief Justice expressed an opinion on the question now before us. On the other hand, in the case of *Sheikh Afzal Ali v. Lala Gaurnarayan* (1), which was also a Full Bench case, Sir Barnes Peacock appears, so far as we can gather from his language, to have been of the same opinion as myself. Under these circumstances, it seems to me that we are not bound by the decision of the Full Bench in the case of *Gunga Doss Dutt v. Ramnarain Ghose* (2), and I think the question now comes properly before this Full Bench to determine it independently of any previous decision of this Court. Looking at it as a question under the Act, I think the answer ought to be that the sale under the Act did confer a complete title upon the purchaser.

JACKSON, J.—I am of the same opinion with the learned Chief Justice. I also think that we are not concluded by the judgment of the Full Bench in the case of *Gunga Doss Dutt v. Ramnarain Ghose* (2). The decision of the Full Bench on that occasion appears rather to have been a decision upon a nearly similar point on a different ground than a decision upon the question now before us. If it were otherwise, no doubt under the rules for references to the Full Bench, we should probably have to govern ourselves by that decision. The simplest and only safe mode of deciding the question before us appears to be upon the construction of ss. 105 and 106 of Act X of 1859, taking those sections along with the other sections of the Act. The modes of executing decrees passed under Act X were originally pointed out in the sections commencing with s. 86 of that Act. The 86th section has been repealed, and is replaced by s. 17 of Beng. Act VI of 1862. That section declares generally what the procedure open to a decree-holder is in these words:—

(1) B. L. R., Sup. Vol., 519.

(2) B. L. R., Sup. Vol., 425.

"Process of execution in any suit hereafter to be instituted under this Act, or under Act X of 1859, may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property." Then in some of the subsequent sections, particular remedies or modes of procedure are indicated in particular cases. Accordingly, s. 105 enacts:—"If the decree be for an arrear of rent due in respect of an under-tenure, which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure," &c. There is a limitation of that in s. 108, where the person who has obtained the decree is a sharer in a joint undivided estate; otherwise, subject to the claim to be made under s. 106, the decree-holder might apply for sale, and the Court might proceed to sell the under-tenure. That procedure is quite separate from the course to be taken in respect of other immoveable property in respect of which I conclude the Court would sell the right, title, and interest of the judgment-debtor; but under ss. 105 and 106, the tenure itself, I take it, is the thing to be sold. It is to be observed that the position of a claimant under s. 106, and what the claimant has to do, are quite distinct from those of a claimant under the other sections of the Act. A claimant under s. 106 is to allege that he is the proprietor of the under-tenure, and was in lawful possession of it, and has to deposit in Court the amount of the decree. That is provided in respect of claimants with regard to under-tenures: and taking all the provisions of these two sections together, it seems to me clear that the Legislature contemplated a separate procedure, and intended that the Court should go on to the sale of the under-tenure itself. I concur therefore in thinking that the under-tenure in this case was liable to be sold, and that the plaintiff could not, by reason of his intermediate purchase at a sale in execution of a decree of the Civil Court, recover the under-tenure from the party who had purchased it at a sale under Act X.

COUCH, C.J.—The special appeal will be dismissed with costs.

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Before Mr. Justice Kemp and Mr. Justice Pontifex.

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CHOWDHRY SHEIKH WAHED ALI (PLAINTIFF) v. MULLICK
ENAYET HOSSEIN ALI AND OTHERS (DEFENDANTS).*

*Execution of Decree—Joint and Several Liability—Limitation—Proceeding to
keep Decree in Force—Act XIV of 1859, s. 20.*

On 29th November 1861, *A* obtained a decree against *B*, *C*, *D*, and others in the following terms:—that “the suit be decreed with mesne profits as far as they can be ascertained to be charged upon all the defendants jointly and severally; the costs of the plaintiff to be paid by the defendants, and each of the defendants to pay his or her own costs.” On 6th October 1866, *C* instituted a suit against *A* to have the sale of certain mauzas, which had taken place in execution of *A*’s decree, set aside. This suit was decided by the High Court in favor of *C*, and the decision was confirmed by the Privy Council on 14th June 1872. In the meanwhile *A* proceeded to execute his decree as against *B* and *D*; *D* objected; the lower Court allowed her objections, and the High Court on appeal, on 12th December 1866, affirmed that decision. The lower Court allowed *A* to proceed to execute his decree as against *B*, and on 2nd June 1866, certain property belonging to *B* was sold in execution of *A*’s decree and purchased by *A*. On 8th August 1866, the Court duly confirmed the sale, and ordered the suit to be struck off the file. On 5th July 1869, *A*, stating that there was still a sum of money due to him under the decree of 29th November 1861, made an application praying that the suit might be restored to the file, and that the rights of *B* in certain property might be put up for sale. Upon a remand the lower Court refused to grant *A*’s application on the ground that it was barred by limitation.

Held, that *A*’s application was not barred, inasmuch as the confirmation of the sale by the Court on 8th August 1866 was a proceeding within the meaning of s. 20, Act XIV of 1859, and sufficient to keep *A*’s decree in force.

Held also that *A*’s decree being a joint one, he was entitled to execute it against any of the defendants he might select.

CHOWDHRY Sheikh Wahed Ali, the plaintiff in the present suit, obtained a decree in 1852 in a suit brought by him, on a *zur-i-peshgi* title, for the refund of the *zur-i-peshgi* in respect

* Miscellaneous Regular Appeal, No. 245 of 1870, against the decree of the Judge of Zilla Patna, dated the 25th June 1870.

of a certain share of Mauza Magjara. Execution of that decree was opposed by one Waris Ali and his daughters Mussamut Jumae and Mussamat Teetoo, who severally claimed different portions of the mauza, Waris Ali claiming under two *bharna* leases or bonds which he said he had made over to his son-in-law, Mullick Enayet Hossein Ali, the present defendant, who was the husband of Jumae, and Jumae and Teetoo setting up independent titles under alleged purchases from the original proprietors prior to the *zur-i-peshgi*; in the case of Mussamut Teetoo there was also a further claim as *kutkinadar* of 175 bigas. The claims thus set up appear to have been disallowed, and the property was put up for sale and purchased by Wahed Ali. The latter, however, being unable to obtain possession, brought another suit in 1854 for possession of the property and for mesne profits against Waris Ali, Enayet Hossein Ali, Mussamuts Jumae and Teetoo, and others. While this suit was pending, Waris Ali died, and the three last-named persons were made parties defendant as representing his estate. They thus became parties to the suit in a double capacity,—namely, in their own rights and as representatives of Waris Ali. On the 29th November 1861, the Judge of Patna, although he had stated in his judgment that Mussamuts Jumae and Teetoo had proved their title to the shares which they claimed, made a decree in favor of Wahed Ali against all the defendants (about 200 in number) in the following terms:—"That the suit be decreed with mesne profits as far as they can be ascertained, to be charged upon the defendants jointly and severally; the costs of the plaintiff to be paid by the defendants, and each of the defendants to pay his or her own costs." This erroneous decree gave rise to a series of intricate and often irregular legal proceedings, in the course of which the Judge of Patna expressly found that Mussamuts Jumae and Teetoo had inherited nothing from their father. Previously to this, however, Wahed Ali, in execution of the decree of 29th November 1861, had attached and sold, and himself become the purchaser of, Mussamut Jumae's separate property. Mussamut Jumae objected to the sale, but her objections were overruled as being too late, and she was forced to bring a regular suit in October 1866 against Wahed Ali for

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the recovery of her property. This suit was decided in her favor, on the 13th August 1868, by a Full Bench of the High Court (1), and on appeal by Wahed Ali, the Privy Council, while dissenting from some of the reasons upon which the decree of the High Court was founded, affirmed that decree on the 14th June 1872 (2).

During the pendency of these proceedings Wahed Ali endeavoured to execute his decree against Enayet Hossein Ali and Mussamut Teetoo. The latter objected, and her objection was, on the 12th December 1866, allowed by the High Court on the ground that it had been found that she was not in possession of any property derived from her father Waris Ali, and that she could not be made liable under the decree save to the extent of property so derived by her. In the meanwhile the lower Court had granted Wahed Ali's application for execution as against Enayet Hossein Ali, and in pursuance of an order dated the 13th March 1866, the latter's rights in certain property were sold on the 2nd June 1866, and purchased by the plaintiff. The sale was duly confirmed on the 8th August 1866, and Wahed Ali filed a receipt for the amount of the purchase-money: at the same time it was ordered that, since the decree-holder sought no further assistance from the Court, his suit should be struck off the file. After the lapse of nearly three years, Wahed Ali, in a petition, presented on the 5th July 1869, stated that the sum of Rs. 16,604-4-3 was still due under the decree of the 21st November 1861, he therefore prayed that the suit might be restored to the file, and that the rights of Enayet Hossein Ali in certain other properties might be sold. Enayet Hossein Ali objected that execution was barred by the law of limitation, and the Judge, taking the same view, dismissed the application. Wahed Ali appealed to the High Court. The appeal was heard by Bayley and Norman, JJ., who, on the 1st April 1870, the original decree not having been put upon the record, remanded the case to the lower Court to ascertain whether such decree was a joint one; and if so, to determine whether the proceedings against Mussamut Teetoo were sufficient to keep it in force. On

(1) 2 B. L. R., F.B., 73.

(2) 11 B. L. R., 149.

remand the Judge of Patna held that execution was barred, inasmuch as the objections of Mussamut Teetoo had prevailed, and she had been "discharged" by the order of the High Court dated the 12th December 1866, and it could not, therefore, be said that Wahed Ali was proceeding in good faith, although at the same time the Judge expressed his opinion that Wahed Ali was doing his best to recover the money from Mussamut Teetoo. He, accordingly, rejected the application, and Wahed Ali thereupon preferred the present appeal to the High Court. He urged that the Judge was wrong in holding that his attempts to execute the decree, because unsuccessful, must be considered not to be *bonâ fide* so as to save limitation; that the entire circumstances and facts of the case showed that Mussamut Teetoo was liable; that the decree was a joint one; and that he was justified in proceeding against any one of the joint-debtors; that the proceedings against Mussamut Teetoo were in law sufficient to keep the decree alive; and that, at any rate, limitation ought to be counted from the date of order of the High Court,—namely, the 12th December 1866.

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Mr. *Woodroffe* (with him Mr. *Twidale*) for the appellant.

Mr. *Gregory* for the respondents.

Mr. *Woodroffe*.—The steps taken by the plaintiff are sufficient to prevent the operation of the law of limitation. The question to be decided is, whether a proceeding is *bonâ fide* or not: success or non-success is entirely immaterial—*Ram Sahai Singh v. Sheo Sahai Singh* (1); Thomson on Limitation, p. 324. There is nothing on the evidence to show that the plaintiff did not *bonâ fide* consider Mussamut Teetoo liable under the decree. Where a decree is a joint one in favor of several plaintiffs, the right of one of the decree-holders to execute is kept alive by proceedings duly taken by another—*Mohesh Chunder Chowdhry v. Mohun Lal Sircar* (2); *Stephenson v. Unnoda Dossee* (3); Thomson on Limitation, pp. 336 and 337. The decree in this case created a joint and several liability

(1) B. L. R., Sup. Vol., 492.

(2) 8 W. R., 80.

(3) 6 W. R., Mis., 18.

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as regards mesne profits, and a joint liability as regards costs. *Wise v. Rajnarain Chuckerbutty* (1) leaves the question undecided whether, upon a decree declaring the existence of a joint and several liability, proceedings against one judgment-debtor are sufficient to keep the decree in force against the others. [KEMP, J.—In that case there were virtually two decrees.] When a joint decree is made against several co-defendants, the decree-holder can proceed, at discretion, against all or any of his judgment-debtors—*Sreenath Ghose v. Sahib Ram Roy* (2). The

(1) 10 B. L. R., 258.

(2) *Before Mr. Justice Kemp and Mr. Justice Markby.*

The 12th August 1869.

SREENATH GHOSE (JUDGMENT-DEBTOR) v. SAHIB RAM ROY AND OTHERS (DECREE-HOLDERS).*

Execution of Decree—Process against one of joint judgment-debtors.

IN execution of a joint decree against the *izardars* of certain property and their gomasta, the present appellant, made in a suit to recover damages for an alleged illegal distress, the judgment-creditors proceeded against the gomasta; and both the Court of first instance and the lower Appellate Court having held that they were entitled so to do, the gomasta preferred the present appeal to the High Court.

Baboo *Bama Churn Banerjee* for the appellant.

The respondents did not appear.

The following judgments were delivered:—

KEMP, J.—Two points are taken in special appeal: "1st, that the lower Courts have misconstrued the decree sought to be executed in holding that your petitioner was liable under it,

whereas the decree, when read with the judgment on which it is based, clearly shows that the *izardars*—namely, Lalla Hurryhur Persad and Baboo Hurry Singh—were the parties made liable under the decree, and not your petitioner; and 2nd, that even if it be considered that your petitioner was liable along with the *izardars*, the decree should not be allowed to be executed against your petitioner, unless it is in the first instance executed against the *izardars*, who are the parties chiefly interested." These grounds are given in the words of the petition of appeal. On the first ground I think, after hearing the decretal order read, that the petitioner, the special appellant, is jointly liable with the lessees under the decree. There can be no question that the distraint was an illegal one, and that it admittedly was so appears from the fact that an issue was raised as to whether the lessees were liable for the illegal act of their gomasta, the special appellant before us, and it does not follow that because the liability of the lessees is established, the gomasta is relieved from all liability. The decretal order being very clear as to the liability of the special appellant, I think that the

* Miscellaneous Special Appeal, No. 285 of 1869, against the decree of the Judge of Zilla Beerbhoom, dated the 11th June 1869, affirming a decree of the Subordinate Judge of that district, dated the 31st August 1868.

principle laid down in *Khaja Abdul Ganni v. Pogose* (1) applies to Mussamat Jumae's suit. The word "proceeding" in s. 20 of Act XIV of 1859 includes every application for execution *bonâ fide* made—*Ram Sahai Singh v. Sheo Sahai Singh* (2). The principle of that case has been affirmed by the Privy Council—*Roy Dhunput Singh Roy Bahadoor v. Mudhomotee Dabia* (3). The proper test is, does a *litis contestatio* exist—*Maharajah Dheeraj Mahtab Chand Bahadoor v. Bulram Sing* (4). The date on which the sale was confirmed

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Court below has not misconstrued the decree, and the first ground of appeal therefore fails. On the second ground we have been referred to a case which is not published, but an authenticated copy of which has been filed with the record, and which was decided on the 13th September 1865 by Loch and Glover, J.J.; that was a case in which the Court of Wards and their *sarbarahkar*, Mr. Gregor Grant, were sued for *wasilat*, and a decree was passed against both jointly; the learned Judges in that case were of opinion that execution could not be taken out against Grant until every means had been taken to recover the amount covered by the decree from the Court of Wards: the Judges did not express any very decided opinion in the matter, and whatever the law may be as between the Court of Wards and a *sarbarahkar*, it is very clear that in the present case, between a landlord and his *gomasta*, who both have been guilty of an illegal act, and both have been held to be jointly liable, the lower Courts were not wrong in law in allowing the decree-holder to proceed against the *gomasta*, the appellant before us. The appeal is therefore dismissed, but without costs, as nobody appears for the respondents.

MARKBY, J.—I am of the same opinion with regard to the case that has

been cited upon the second point. I am very much inclined to think that if we had anything more than the short judgment of the Court before us, it is very possible that that case might be explained; but even if it could not, I must say, although with great respect for the Judges who decided that case, that I should have some difficulty in coming to a conclusion that on a joint decree against the Court of Wards and the servants of the Court any control could be exercised as to which party the execution-creditor should proceed against. I consider that on a joint decree in every case the execution-creditor is at liberty to proceed against all or any of his judgment-debtors as he may choose. But as has been pointed out by Kemp, J., this is not a case between the Court of Wards and their servant, but a case between an *izarदार* and his *gomasta*, so that it is not necessary to say decisively in this case whether or no the former decision of this Court, quoted above, is right. I am quite clear that in this case execution may proceed against the *gomasta*.

(1) 4 B. L. R., A. C., 1.

(2) B. L. R., Sup. Vol., 492.

(3) 11 B. L. R., 23.

(4) 6 B. L. R., 611; S. C., 13 Moore's L. A., 479.

1878 and the plaintiffs received the proceeds of the sale, is the date on which the last "proceeding" was taken within the meaning of s. 20 of Act XIV of 1859—*Gunga Bishen Chand v. Maharaja Dhiraj Mahtab Chand Bahadur* (1).

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(1) *Before Mr. Justice Bayley and Mr. Justice Mitter.*

The 4th August 1868.

GUNGA BISHEN CHAND (JUDGMENT-DEBTOR) v. MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR (DECREE-HOLDER).*

Act XIV of 1859, s. 20—Proceeding to enforce Decree—Receipt of Sale Proceeds—Onus.

Baboo Rashbeharee Ghose for the appellant.

Baboo Chunder Madhub Ghose for the respondent.

THE following judgments were delivered:—

BAYLEY, J.—There is no ground whatever for this appeal.

The decree-holder could not properly obtain the money on his decree until the sale was confirmed, and therefore it was no fault of his that the confirmatory order was delayed, but it was owing to the objection of the special appellant, judgment-debtor. Again, there is not the slightest trace of the decree not being *bonâ fide*, as has been contended by the special appellant.

In my opinion the appeal is altogether vexatious and ill-advised.

The decision in *Juggut Mohinee Bhee v. Ram Chand Ghose* (a) has no bearing on the circumstances of this

case. There it was held that a mere formal confirmation was not a proceeding. But here we have the special appellant objecting, his objections set aside, the sale upheld, and then the money taken, which certainly is to my mind a proceeding.

Therefore I would reject the appeal with costs.

MITTER, J.—I entirely concur with my learned colleague. It is not necessary for us to decide in this case, whether a proceeding for the confirmation of a sale held in execution of a decree is a proceeding within the meaning of s. 20, Act XIV of 1859. The decree-holder received the proceeds of sale subsequent to such a proceeding, and the receipt of sale proceeds is undoubtedly a proceeding within the meaning of that section.

The second objection is equally untenable. The decree-holder shows that there was a proceeding within three years next preceding the date of the last application. If the judgment-debtor wanted to question the proceeding on the ground that it was not *bonâ fide*, it was for him to urge that objection in the Court below, and not only to urge it, but to prove it also in the best manner he could.

There is no reason why any proceedings taken in execution of a decree duly obtained in a Court of Justice should be presumed to be *malâ fide*, and in the absence of any such presumption, the

* Miscellaneous Appeal, No. 286 of 1868, against the decree of the Judge of Zilla East Burdwan, dated the 8th March 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 26th September 1867.

Mr. Gregory, for the respondents, submitted that the proceedings against the co-debtors would not keep the decree alive as against Enayët Ali—*Wise v. Rajnarain Chuckerbutty* (1) and *Khema Debea v. Kumolahant Buhshi* (2). According to the later decisions the substance, and not the form, of the decree must be looked at.

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Mr. Woodroffe was not called upon to reply.

Cur. adv. vult.

The judgment of the Court was delivered by

KEMP, J. (who, after shortly stating how the case now came before the Court, continued).—The question, therefore, is whether the application, made on the 5th of July 1869, is barred under s. 20, Act XIV of 1859? We are clearly of opinion that it is not barred. It is proved that the sale was confirmed on the 8th of August 1866. It is said, and this also seems to have been the opinion of the late Norman, J., that the decree-holder is not entitled to date from the date of the confirmation of the sale. It seems to us that, under the Full Bench Ruling in *Ram Sahai Singh v. Sheo Sahai Singh* (3), which judgment was subsequently noticed and approved of by the Privy Council in *Maharaj Dhiraj Mahtab Chand Bahadoor v. Bulram Sing* (4), that any act of the Court—and the confirmation of the sale would be an act of the Court—would be an act done in keeping in force the decree. In this case it is clear that the decree-holder, who is the purchaser at the sale which took place on the 2nd of June, 1866, received money, or did that which is tantamount to receiving money, by giving a receipt for the purchase-money of the property; and that act on his part could not have been done until the sale was confirmed. There-

onus lies upon the party who challenges them as such. The uniform rule of law is that the party who pleads want of *bona fides* has to prove it, but in this case the judgment-debtor neither appears to have taken this objection in the Court below, nor has he attempted to substantiate it by evidence of any kind. I think, there-

fore, that this objection too must be overruled. The appeal ought to be dismissed with costs.

(1) 10 B. L. R., 258.

(2) *Id.*, 259 note.

(3) B. L. R., Sup. Vol., 492.

(4) 5 B. L. R., 611; S. C., 13 Moore's L. A., 479.

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fore we think that, taking the 8th of August 1866 as the date of the last act done in keeping this decree in force, the present application, made on the 5th of July 1869, is in time.

We are further of opinion that, looking to the acts of the decree-holder from the time he obtained his decree many years back, up to the 12th of December 1866, in the case of Mussamut Teetoo, and up to a much later date in the case of Mussamut Jumae, he was all along endeavouring to execute his decree. Their Lordships of the Privy Council, in a decision in the case of *Roy Dhunput Singh Roy Bahadoor v. Mudhomotee Dabia* (1), observe that it does not follow that, because the steps taken by a decree-holder are unsuccessful or infructuous, therefore it must be held that he has not proceeded in a *bond fide* manner to keep his decree alive. The case of the Maharaja of Burdwan above alluded to was a very peculiar one, and this case is much stronger. In the case of the Raja, he had made the mistake of applying to execute his decree in the wrong case. Their Lordships held, however, that this proceeding, although it was a mistake, showed a *bond fide* intention on the Raja's part to execute his decree, and he was allowed to do so. We, therefore, think in this case that the decree-holder is entitled to execute his decree, and the decree being a joint one, he is entitled to execute it against any of the parties he may choose to select. He first attempted to execute it against other parties, and was unsuccessful; he is now seeking to execute it against Enayet Ali; and as his application of the 5th of July 1869, as shown above, is not barred, we reverse the decision of the Court below and decree this appeal with costs.

The decree not awarding any interest, this Court passes no order as to interest.

Appeal allowed.

(1) 11 B. L. R., 23.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

THE BANK OF BENGAL (PLAINTIFFS) v. NUNDOLALL DOSS AND
ANOTHER (DEFENDANTS).

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Jany. 5 & 7.

Execution of Decree—Attachment by Mortgagee—Act VIII of 1859, s. 271.

Pending a suit against *A* and *N* upon a bill of exchange, *A* deposited with the plaintiff as security for the amount due upon the bill the title deeds of property belonging jointly to *N* and himself. The plaintiff subsequently got a decree for the amount due upon the bill. Thereafter one *S*, in execution of a decree against *A* and *N*, attached certain property of theirs, including the mortgaged property, and caused it to be sold; and the surplus sale proceeds, after satisfaction of *S*'s decree, were paid into Court to the credit of his suit. Intermediately between this attachment and sale, the plaintiff also attached under his decree on the bill of exchange the mortgaged and other property of *A* and *N*, and after the plaintiff's attachment *N* ratified the equitable mortgage made by *A*. The sale under *S*'s attachment having taken place, the plaintiff sued *A* and *N* and the purchasers at such sale of the mortgaged property for foreclosure or sale thereof, and obtained a decree declaring that he had a good equitable mortgage of *A*'s share in the joint property, and for an account and sale in default of payment; and the plaintiff subsequently on 26th May 1873 got an order under his decree upon the bill of exchange for payment to him of the surplus sale proceeds lodged in Court to the credit of *S*'s suit, and for sale of certain of the properties, other than the mortgaged property, which he had attached. Under this order the money was paid out to the plaintiff, and the properties were advertized for sale. Macpherson, J., having, on an application by *A*, set aside this order, and directed that the plaintiff should refund into Court the money paid out to him, and that the sale should be stayed, the Court on appeal refused to set aside the order of the 26th May, but made the plaintiff undertake to pay into Court the mortgage-money with interest if the same should be received by him from the defendants in the mortgage suit.

APPEAL from an order of Macpherson, J., dated the 26th August 1873, directing the plaintiff Bank to refund into Court a certain sum which it had taken out, and restraining the Bank from selling certain properties which it had attached.

The circumstances under which the order was made were as

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follows :—On the 29th of July 1872, the Bank obtained a decree against Nundolall and Anundolall Doss upon a bill of exchange drawn by the former and accepted by the latter. Previous to the date of this decree, but after suit, Anundolall deposited with the Bank, as security for the amount due on the bill, the title deeds of certain property which belonged to himself and Nundolall jointly. On the 31st July 1872, one Sumbhoo Chunder Ghose, in execution of a decree against Nundolall and Anundolall, attached the mortgaged as well as certain other properties; and on the 9th of August the Bank under its decree of the 29th July also attached the mortgaged and other properties of the two Dosses. On the 3rd September Nundolall ratified the equitable mortgage made to the Bank by Anundolall. In December Sumbhoo Chunder Ghose caused the properties attached by him to be sold, and the surplus proceeds of sale, after satisfaction of his decree, amounting to Rs. 2,679-3-5, were paid into Court to the credit of his suit. Previously to this sale the Bank gave the Sheriff notice of its claim under the equitable mortgage; and it was stated that the letter containing such notice had been read aloud at the sale, but this was denied by the Bank. On the 14th January 1873, the Bank sued Nundolall, Anundolall, and the purchasers of the mortgaged property at the Sheriff's sale for foreclosure or sale thereof, and on the 14th of May obtained a decree which declared that the Bank had a good equitable mortgage of the defendant Anundolall's share of the property, and for an account and sale in default of payment. On the 26th of the same month the Bank got an *ex parte* order in its suit upon the bill of exchange for payment to it out of Court of the Rs. 2,679-3-5 which had been lodged to the credit of the suit by Sumbhoo Chunder Ghose, and for the sale of certain of the properties attached by it on the 9th August 1872, other than the mortgaged property. Pursuant to this order the money was paid over to the Bank, and the property was advertized for sale. Thereupon, and before the decree in the mortgage suit had been drawn up, an application was made on behalf of the defendant Anundolall, for an order directing the Bank to refund the money into Court, and restraining it from selling the property which had

been so advertized for sale. This application was opposed by the Bank, but was granted on the 26th of August 1873, the following being the judgment of the Court:—

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MACPHERSON, J. (after shortly stating the facts, continued).—Under s. 271 of Act VIII of 1859, the Bank is not entitled to take this money out of Court. The concluding clause of that section says:—"Provided that, when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale." In this case, perhaps, the property was not formally and expressly sold subject to the mortgage. But practically, and in fact, it was so sold. Though it is said that the letter from the Bank to the Sheriff, giving him notice of the Bank's claim as equitable mortgagee, was not read aloud at the sale, the Bank did give formal notice of the mortgage to the Sheriff. That being so, whether the notice was formally read out or not matters little in my opinion; and in fact, the Bank have since sued those who purchased at that sale, and have obtained a declaration from the Court that they purchased subject to the Bank's mortgage. It may be that some of the money taken out by the Bank was not the produce of the sale of the mortgaged property. But it is certain that some of it is the produce of the sale of that property. That being so, and considering that our practice is similar to that laid down in s. 271, the Bank, before asking to have any of the money in Court paid out to it, should have shown clearly what money it asked for, and that it was not money produced by the sale of the mortgaged premises. To a considerable portion of the money the Bank could not have been entitled. The money must be brought into Court; and the Bank, before taking any portion of it out again, must satisfy the Court that it is not the proceeds of the sale of that which was the subject of the mortgage.

I think there is no doubt that the Bank has a right to proceed under both decrees so long as it proceeds in a regular manner, and does not needlessly harass the judgment-debtor. Therefore I cannot order the property to be released from the attachment in the first suit. My only doubt is as to staying the sale

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which has been advertized. As regards that sale, Anundolall Doss's point is that, whereas this same mortgaged property was sold under Sumbhoo Chunder's attachment, and sold subject to the mortgage (which it was, inasmuch as the Bank has obtained decree to that effect against the purchasers), the Bank is now entitled to sell Anundolall's share of the property free from any encumbrance created by the sale in Sumbhoo Chunder's suit. And Anundolall Doss urged the Bank to exercise this right, because if the Bank does not do so, Anundolall will practically lose the value of the equity of redemption which he has against the Bank, because the purchasers at Sumbhoo Chunder's sale have a clear title against him. There is some equity in this; but I should not be prepared to restrain the Bank from proceeding, if the Bank would protect Anundolall from loss in this matter. If the Bank makes over to Anundolall its right and title in the mortgaged property sold under Sumbhoo Chunder's attachment, I shall not restrain it. But if no arrangement can be made to protect Anundolall from what as it seems to me really is an unfair position in which he is placed, I think this sale should be stayed, and that steps should be taken to have the two decrees which the Bank holds for this one debt worked out together so as not to cause unnecessary loss to Anundolall Doss. The matter will stand over till Thursday morning.

Subsequently, on the 28th August 1873, the *Advocate-General*, on behalf of the plaintiffs, stated that they were not disposed to make any concession.

The Court then made the order to stay the sale, and that the plaintiffs should pay the costs of the application; the whole order to bear date as of the 26th August 1873.

The present appeal was preferred by the Bank against the above order.

The *Advocate-General* offg. (Mr. Paul) and Mr. Evans for the appellants.

Mr. Lowe and Mr. Phillips for the respondent Anundolall.

The *Advocate-General*.—This was an application by Anundolall alone, whereas the relief is with respect to the whole interest both of Anundolall and Anundolall. The property was

not sold subject to our mortgage. S. 271, Act VIII of 1859, does not apply to a case like this; its operation is limited to cases of competition amongst rival creditors. If the judgment be correct, a mortgagor will always be able to relieve himself of all liability under his covenant by alienating the mortgaged property. The Bank may work either of the decrees it has obtained. Anundolall can have no equity, because, if he pays, he would be entitled to stand in the place of the Bank. Moreover, till the decree in the mortgage suit is drawn up, it is impossible to say what equities there may be between the parties.

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Mr. *Evans* on the same side.—The effect of the decree in the mortgage suit was to give the purchasers at the Sheriff's sale the whole interest of Nundolall in the mortgaged premises, but only the equity of redemption of Anundolall's share. It would be wholly impossible to determine in what shares Nundolall and Anundolall were entitled to the money paid into Court. If any equities existed between them, such equities could only be worked out by themselves; the Court could not work them out; and, at all events, it could not do so on a motion like this made in the action upon the bill of exchange. Those equities, if raised at all, should have been raised in a suit properly instituted for that purpose. The Bank had merely a right capable of being enforced by legal proceedings against the purchaser—*Sheikh Fakeer Bux v. Chutturdaee Chowdry* (1). It had a clear right

(1) *Before Sir Richard Couch, Kt.,* Moonshee Mahomed Yoosuff for the
Chief Justice, and Justice Sir C. P. appellants.
Hobhouse Bart.,

The 5th August 1870.

Mr. R. E. Tindale for the respondent.

SHEIKH FAKEER BUX (DECREE-HOLDER) v. CHUTTURDAREE CHOW-DRY (JUDGMENT-DEBTOR).*

The judgment of the Court was delivered by

Couch, C.J.—I think that s. 271, Act VIII of 1859, or rather the proviso in that section, is intended to

* Miscellaneous Special Appeal, No. 484 of 1870, against the order of the Officiating Judge of Zilla Tihoot, dated the 12th February 1870, reversing an order of the Munsif of Mozufferpore, dated the 4th September 1869.

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to attach the surplus sale proceeds in execution of its money-decree—*Bolakee Lal v. Chowdhry Bungsee Singh* (1).

Mr. *Phillips* for the respondent.—Although this suit was brought on the bill of exchange, yet, as it was for the same debt which constituted the consideration for the mortgage, the question may be treated as though the suit had in the first instance

apply to a case where the property is actually sold subject to a mortgage, and where the transaction is such that the purchaser is buying the property subject to the mortgage,—where he is in fact only buying the equity of redemption which remains in the judgment-debtor; and it does not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser. This appears to have been the view taken by this Court in *Mirza Futeh Ali v. Gregory* (a). There the Court says:—"It is not equitable that the purchaser who purchased and paid for only the mortgagor's interest in this property should hold it released from Gregory's lien." Now here it does not appear that the sale to the purchaser was in fact subject to the mortgage. •By "in fact" I mean that it was not so subject by the contract of sale, and there was merely a legal right existing which might be capable of being enforced. It seems that a petition, which was presented by the present appellant, was not taken notice of, and neither in the proclamation of sale, nor in any of the sale proceedings, is mention made of the existence of any mortgage. Nor is there anything to show that only a limited right of the judgment-debtor was to be sold. Therefore upon that construction of s. 271, I should say that the proviso does not apply to the present case.

I think there is another ground upon which it may be held that the above section does not apply; and that is this,—that it was competent for the present appellant to waive his right as a mortgagee, and to bring his suit for the recovery of the money due to him upon the bond. He did bring that suit, and got a decree for the money. It is true that that decree says that the execution shall be had against the property which was pledged, and afterwards against the person. Nevertheless, it is a decree for the money which was due upon the bond, and I think it was competent for him to say "I am content to rest upon the decree which I have obtained, and waive the right which I have as mortgagee, and resting upon that decree, I now seek to have a share in the surplus proceeds of sale under s. 271." I think he is entitled to do that. For both the reasons it seems to me that the decision of the Court below is wrong. This view is in accordance with the decision of Steer and Levinge, JJ., in *Ram Dyal Banerjee v. Ramkulpoo Mookerjee* (b).

We reverse the decision of the lower Appellate Court with costs of this Court and of the lower Appellate Court, and the order of the first Court will stand.

(1) 7 W. R., 309.

(a) 6 W. R., Mis., 18.

(b) W. R., Jan. to July 1864, 825.

been brought for the mortgage debt. Now it has been decided over and over again that a judgment on the covenant in a mortgage bond will not entitle the mortgagee to proceed against the equity of redemption. [PONTIFEX, J.—All that the cases decide is that the mortgagee cannot sell subject to his mortgage, *i.e.*, that he shall not sell the property and at the same time retain his security. Moreover, the money is not the same thing as the equity of redemption.] The Bank never attached the money, it attached the property; and although the sale was at the instance of another creditor, it was for the benefit of all. As to the mortgagee's incapacity to attach and sell the equity of redemption, see *S. M. Kamini Debi v. Ramlochan Sirkar* (1). [COUCH, C.J.—There the mortgagee attached and sold the equity of redemption, whereas in the present case, although the mortgagee may be said to have attached the equity of redemption, it was neither sold at his instance, nor was he the purchaser.] No, but as I have already mentioned, the sale enured for the benefit of all attaching-creditors. If at the time of sale the Bank had perfected the suit on the mortgage, the question might have been different; but as it was, until the termination of the six months during which the mortgagor is entitled to redeem, the Bank had no right to the money. [COUCH, C.J.—That is the case according to the practice in Bombay.] I submit that it must be the practice here also, for otherwise the mortgagee could do indirectly what he could not do directly, *viz.*, proceed against the mortgaged property. See further on this point—*Brajanath Kundu Chowdhry v. S. M. Gobindmani Dasi* (2) and *Neerunjun Mookerjee v. Oopendro Narain Deb* (3). [COUCH, C. J.—Those cases decide that the mortgagee cannot attach and sell, but where the attachment and sale are by another creditor, the reason for the prohibition does not apply. In the case of *Brajanath Kundu Chowdhry v. S. M. Gobindmani Dasi* (2), Phear, J., doubtless, contemplated a sale following the attachment.] If that had been in his contemplation he might have allowed the attachment; since in a case in which there are

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(1) 5 B. L. R., 460.

(2) 4 B. L. R., O. C., 83.

(3) 10 B. L. R., 57.

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several attaching-creditors, the sale might take place under any one of the attachments; but as a matter of fact, Phear, J., denied the mortgagee's right to attach. The cases which have been cited show that the mortgagee cannot satisfy his money decree out of the mortgaged property either directly or indirectly. [PONTIFEX, J.—The mortgagee is not allowed to sell, because the mortgagor has a right of redemption; but when another attaching-creditor sells, that right of redemption ceases.] As to that see the observations of Norman, J., in *S. M. Kamini Debi v. Ramlochan Sirkar* (1). [PONTIFEX, J.—S. 271, Act VIII of 1859, recognizes the mortgagee's right to attach the mortgaged property.] Not necessarily; because if the mortgagee attached other property than the mortgaged property, he would still come within the words of the proviso in that section.

Mr. Lowe on the same side.—The Civil Procedure Code does not contemplate a perpetual attachment without power of sale: but if the mortgagee be allowed to attach the equity of redemption, the mortgagor will be prevented from raising money by alienation of the equity of redemption, unless he can obtain the consent of the mortgagee. Such consent might or might not be given; in the latter case the attachment would be perpetual; in the former it would be an instrument to compel the mortgagor to pay off the mortgage debt before it was legally due.

The judgment of the Court was delivered by

COUCH, C.J.—The ground upon which we decide is shortly this: If the Bank, on 26th of May 1873, instead of applying for the order which it did apply for, had attached the surplus money which was in Court, its proceedings would have been regular under s. 237 of Act VIII of 1859. The equity of redemption having been sold in execution of decrees obtained by other persons, there is no authority against the right of the Bank to execute the decree which it had obtained on the sur-

(1) 5 B. L. R., 460, at p. 460.

plus remaining after satisfying those decrees, that being the property of the defendants in the suit on the bill of exchange. The cases we have been referred to appear to me to be authorities against a mortgagee attaching and selling the equity of redemption. The reasons given in those cases for the decision do not, I think, apply to a mere attachment by the mortgagee. It may be reasonable that he should be allowed to attach the equity of redemption so as to preserve to himself the right of sharing in the surplus if any other creditor should attach and sell it, although it would not be right he should do it. But assuming that the authorities go so far as to prevent an attachment by a mortgagee, still, as the Bank might have attached the surplus, I think we ought not to set aside the order which was made on the 26th of May 1873; but we ought, in declining to set aside the order, to impose on the Bank of Bengal terms which will secure to the applicants Nundolall Doss and Anundolall Doss the repayment of any surplus which may be in the hands of the Bank, or which may remain in Court after the Bank has been satisfied what is due in respect of its mortgage. The best way of doing this is that the Bank, instead of keeping the mortgage money and interest, if it should be received from the defendants in the foreclosure suit, should undertake to pay the money into Court in the same manner as it would be paid in if the property should be sold.

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The fact of the order which restrains the Bank from proceeding to sell the property which was not mortgaged goes on the same ground. The order of the 26th August last is set aside. The money will be paid into Court, whether the property is sold or not, to be dealt with according to the respective rights of the Bank of Bengal, Nundolall Doss, and Anundolall Doss.

We think the Bank ought to have the costs of this appeal and of the motion before the original Court.

Appeal allowed.

Attorneys for the appellants: Messrs. *Chauntrell, Knowles, and Roberts.*

Attorney for the respondents: Baboo *G. C. Chunder.*

APPENDIX.

APPENDIX.

Before Mr. Justice Macpherson.

BANK OF BENGAL v. NEWTON AND ANOTHER.

1873
Sept. 15.

Attachment before Judgment—Priority of Official Assignee—Act VIII of s. 81—Insolvent Act (11 & 12 Vict., c. 21), ss. 7 & 49.

IN this case the Bank of Bengal had, on the 13th May last, instituted a suit against the defendants, who were the members of the firm of Payne and Co., and who carried on business at the Belatee Bungalow in Calcutta, for the recovery of Rs. 22,261-8-2, with interest. On the 15th May, the Bank applied for and obtained a prohibitory order for an attachment before judgment under s. 81 of the Civil Procedure Code, under which they attached the defendants' right, title, and interest in and to the Belatee Bungalow, the attachment being made on the 17th May. The defendants, on the 20th May, were adjudicated insolvents on the petition of the Agra Bank, and on the same day, a vesting order was made vesting the estate and effects of the insolvents in the Official Assignee.

Mr. Kennedy, on behalf of the Official Assignee, now moved, on notice to the Bank's attorneys, for an order directing the release of the attached property, on the ground that the Official Assignee's claim under the vesting order was entitled to priority over the claim of the Bank under the attachment. The learned Counsel contended that, although an attachment, previous to the date of the vesting order, in execution of a decree, confers on the judgment-creditor a prior right to that of the Official Assignee, see *Anand Chandra Pal v. Panchnal Surma* (1) and *Aga Mahomed Ali Shiraji v. Judah* (2), the law is otherwise as regards attachment before judgment under s. 81 of the Civil Procedure Code; see *Petumber Mundle v. Gocool Doss Soonderjee* (3), *Rampersaud v. Callachund Doss* (4), and *Gamble v. Bhologir* (5).

The Advocate-General, offg. (Mr. Paul), for the Bank of Bengal, admitted that he could not dispute the Official Assignee's claim to priority.

MACPHERSON, J., ordered the prohibitory order to be set aside, and the property attached thereunder to be released.

Attorney for the Official Assignee: Mr. Dignam.

Attorneys for the judgment-creditor: Messrs. Chauntrell & Co.

(1) 5 B. L. R., 691.

(2) 7 B. L. R., 50.

(3) 1 I. J. (N. S.), 827.

(4) 1 I. J. (N. S.), 825; S. C. on appeal,
1 I. J. (N. S.), 878.

(5) 2 Bom. H. C. Rep., 149.

Before Mr. Justice Jackson and Mr. Justice Mitter.

1878
Sept. 11.

IN THE MATTER OF THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS FOR
THE SUBURBS OF CALCUTTA *v.* ANEESOODDEEN MEAH.*

Conviction—Illegal Sentence—Fine.

THE following case was referred by the Magistrate of the 24-Pergunnas for the opinion of the High Court:—

"The defendant was, on the 18th July last, convicted before a Bench of Magistrates for infringing the provisions of s. 66, Beng. Act III of 1864, in that he had kept on his land some bones more than twenty-four hours, otherwise than in a proper receptacle. The Bench found him guilty, and sentenced him to pay a fine of Rs. 10, and further ordered him to remove the bones in three days, or in default to pay a fine of Rs. 2 for every day the nuisance continued unabated.

"It appears to me that, in accordance with the rulings of the High Court in the cases of *In re W. R. Love* (1) and *In re Sagar Dutt* (2), the latter part of the conviction is bad, as being in fact an adjudication in respect of an offence which had not then been committed. As such an order vitiates the entire conviction, I submit the proceedings with a view to their being quashed should the High Court think this course necessary."

The opinion of the Court was delivered by

JACKSON, J.—We think it proper to follow the precedent in the case of *In re W. R. Love* (1). In the case of *In re Sagar Dutt* (2), the Court had before it a conviction before the Justices, regulated by the English law, and which "could not be amended."

We set aside so much of the order before us as inflicts a fine prospectively of "Rs. 2 for every day the nuisance remains."

Before Mr. Justice Markby and Mr. Justice Birch.

1878
May 7.

MONGOLA DOSSEE, MOTHER OF SHOSHEE BHOOSUN KUR, MINOR
(DEFENDANT) *v.* SARODA DOSSEE (PLAINTIFF).†

*Minor, Suit against—Party—Guardian—Certificate—Act XL of 1858, s. 3—
Adoption—Declaratory Decree.*

THIS was a suit brought in the first instance against "Sreemutty Mongola Dossee, mother of Shoshee Bhoosun Kur." Subsequently, but how and when

* Reference to the High Court, under s. 296 of Act X of 1872, by the Magistrate of the 24-Pergunnas, dated the 29th August 1873.

† Special Appeal, No. 1159 of 1872, from a decree of the Judge of Midnapore, dated the 1st May 1872, affirming the decree of the Officiating Subordinate Judge of that district, dated the 20th May 1871.

(1) 9 B. L. R., App. 85.

(2) 1 B. L. R., O. Cr., 41.

did not appear the words "a minor" were inserted after the name "Shoshee Bhoosun Kur."

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DOSSEE.

The suit was brought to set aside "the allegation of the defendant, Mongola Dossee, that her son, Shoshee Bhoosun Kur, had been adopted by Nobokishore Kur, the father of the plaintiff, and had therefore inherited his property."

In settling the issues the Officiating Subordinate Judge designated Mongola Dossee as the guardian of the minor Shoshee Bhoosun, but the designation of the defendant in all the other proceedings, including the decree, corresponded with that in the plaint. In the appeal to the District Judge, and in the appeal to the High Court, the defendant designated herself as "mother and guardian of Shoshee Bhoosun, a minor." There was nothing to show that Mongola Dossee had obtained a certificate of guardianship, or had been appointed guardian *ad litem*.

The Officiating Subordinate Judge of Midnapore decided the case in favor of the plaintiff, and the Judge, on appeal, confirmed his decree.

The defendant then preferred a special appeal to the High Court.

Mr. G. Gregory (with him Baboo Bhowanichurn Dutt), for the appellant, contended that Shoshee Bhoosun ought to be a party to the suit, otherwise the decree therein would not bind him. The objection was not made, too late; see *Sreenarain Mitter v. Sreenuttu Kishen Soondery Dossee* (1).

Baboo Doorgamohun Doss, for the respondent, urged that the non-joinder of the minor ought to have been objected to in the Court of first instance. He was properly represented by his mother, and at all events the decree was good as against Mongola Dossee.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts, continued).—It is not very easy to ascertain whether the plaintiff originally intended this as a suit against Mongola Dossee as guardian of the minor, or as a suit against Mongola Dossee herself. It is however now contended that the suit was brought against the minor. If that be so, the proceedings in the first Court were informal throughout; and even supposing that there had been no other objection to them, it is extremely doubtful whether they would have been valid as against the minor. In all suits in which the minor is concerned, the minor ought to be himself the defendant, and to be so described; some other person being named as his guardian in the suit. That is the form pointed out in an analogous case by Beng. Act IV of 1870, s. 69, and is in accordance with well-known practice. But further than this, it nowhere appears upon the record that Mongola Dossee is the certificated guardian of this minor, or that she has been allowed to defend this suit under the provisions of s. 3 of Act XL of 1858. It is impossible therefore to treat this as a suit against the minor.

(1) 11 B. L. R., 171, at p. 191.

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It is contended, however, that it may be treated as a suit against Mongola Dossee herself, and that it is at any rate a good declaratory decree against her. It is somewhat strange to argue that a decree is good as against a person whom the plaintiff did not intend to sue; but apart from that, we think no suit to make any declaration as to this adoption could be brought against any other person than the adopted son himself.

If any such declaration ought to be made at all, it ought to be made in a suit in which the minor is defendant. It is something quite novel to attempt to bring a suit for the simple purpose of declaring the rights of persons who are not parties to the suit. Such a proceeding we consider altogether improper, and we think that we ought to discountenance it by deciding that no such suit will lie, and that the decree of the Moonsiff, as well as the order of the District Judge affirming the same, be set aside. The appeal has been in a manner successful; but as the objection was not taken below, there will be no order as to costs.

Before Mr. Justice Pontifex.

1878

Sept. 2.

In re GHASSEERAM, AN INSOLVENT.

Taxation.—Commission, Charge by Judicial Officer for executing—Counsel's Fees—Insolvent Court—Practice.

IN the course of the proceedings in this insolvency, the Official Assignee, Mr. A. B. Miller, obtained, on the 12th February 1872, a rule *nisi* calling on one Dabee Persaud, alleged to have been gomasta to the insolvent, to show cause why he should not hand over and pay to the Official Assignee certain goods and moneys claimed as part of the insolvent's estate. Dabee Persaud, with a view to showing cause, applied for a commission directed to the Judge of Agra as Commissioner to examine certain witnesses on his behalf. The commission duly issued, but the Judge of Agra refused to execute it, except on being paid in the first instance a fee of five gold mohurs for each sitting under the commission, and Dabee Persaud was accordingly obliged to pay such fees, the total of which amounted to Rs. 595. On cause being shown the rule *nisi* of the 12th February 1872 was discharged, and Mr. Miller was ordered to pay Dabee Persaud's costs of appearing to show cause, including his costs of the commission.

UPON the taxation of the bill of costs as between party and party, the Taxing Officer disallowed the sum of Rs. 595 paid by Dabee Persaud to the Judge of Agra for the execution of the commission, and allowed a brief fee of ten gold mohurs, and two additional fees of ten gold mohurs each, to the senior Counsel for Dabee Persaud.

Exceptions to this taxation were filed by both parties; but the Taxing Officer overruled the objections, on the ground, as regarded the Rs. 565 paid to the Judge of Agra, that a judicial officer is not entitled to charge for executing

a commission; see a minute of Sir Barnes Peacock's, in which two other Judges (the late Norman, J., and Phear, J.) concurred (1). He intimated in conclusion that Dabee Persaud might have obtained the directions of the Insolvent Court before complying with the demand of the Judge of Agra; and it was still open to him to take such steps as he might be advised for a refund.

On the question of the allowance to the senior Counsel of a brief fee, and two additional fees of ten gold mohurs each, the Taxing Officer said:—"It is contended that not more than half the amount should have been allowed as between party and party. A fee of ten gold mohurs may be considered as a maximum fee to be allowed to Counsel for appearing in the Insolvent Court. In the present case it did not seem to afford more than adequate remuneration, having regard to the nature of the case. It should be mentioned that the

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(1) The minute in question dated 3rd June 1865 was appended by Peacock, C.J., to a reference by the Officiating Registrar of the High Court asking for the opinion of the Court as to the manner in which the costs and expenses of executing commissions issuing from the High Court should be provided for, and was as follows:—

"It appears to me that the difficulty is in this Court's remitting the money. If an order be made, under s. 182, Act VIII of 1859, that a reasonable sum be paid into Court by the party at whose instance the commission is issued to cover the expenses thereof, I think it would be advisable to add a note at the foot of the commission, stating that the Commissioner shall not be bound to execute the same, unless such a sum as the Commissioner shall think reasonable be deposited with the Commissioner for the expenses [of executing the same, and also] of summoning the witnesses, and defraying their travelling and other expenses. If the commission be issued to a Court of Justice, or other office, not entitled to charge for executing the commission, the words in brackets may be omitted.

As a general rule, the commission under s. 175, Act VIII of 1859, would issue to the Court within whose jurisdiction the witnesses may reside, and which can most conveniently execute the same, in which case I apprehend no fee would be paid to the Court executing it.

I presume that the money mentioned in letter No. 81 of 1864, dated July 8th, from Major Fytche, has been paid, and that the letter was merely sent up as an example.

If not, the attorney who sent the commission should be called upon to show cause why he should not pay the money; unless upon application by the Registrar, he will undertake to settle the amount.

The learned Judges, who usually exercise original jurisdiction, should be consulted as to this before anything is done. For this purpose it should be circulated to them."

(Sd.) B. PEACOCK.

The minute was accordingly sent to Norman and Phear, JJ., who concurred in the course therein proposed to be adopted with the following remarks:—

"I think that this is the best mode of dealing with the difficulties which have arisen. I have lately ordered deposits to be made, or the attorney to undertake to pay the expenses. But the objection to that course is that the attorney has often no means of ascertaining what the expenses are likely to be."

(Sd.) J. P. NORMAN.

"I have lately made it a condition of the commission issuing that the attorneys of the parties become respectively liable for the expenses which flow from the execution of their portions respectively of the commission; and I have directed a memorandum to be inserted in the commission to the effect that the Commissioner may refuse to enter upon it until his charges and expenses are prepaid him. I am inclined to think that this is the least cumbersome mode of obviating the subject of complaint."

(Sd.) J. B. PHEAR.

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GHASSEERAM.

fee to which exception has been made is not more than was paid by the Official Assignee to his own senior Counsel."

Dabee Persaud thereupon, with Mr. Miller's consent, petitioned the Court that the exceptions filed respectively on behalf of himself and of Mr. Miller to the taxation of his bill of costs might be set down for argument, and the matter accordingly now came on for hearing.

Mr. *W. Jackson* for Dabee Persaud.—In disallowing the charge of executing the commission, the Taxing Officer has entirely relied on the minute of Sir Barnes Peacock; but the rule therein laid down is not applicable to the Court at Agra. The fees to the senior Counsel were rightly allowed: the Taxing Officer has a discretion in such matters; he finds, as a fact, that these fees were reasonable, and the Court will not interfere, *Marshall on Costs*, p. 327. Moreover, a similar fee was paid by the other side to their senior Counsel.

Mr. *Ingram* for A. B. Miller.—The Judge at Agra was bound to execute this commission; and it would be contrary to public policy to pay him for what he was bound to do. The fees to the senior Counsel were excessive. A client may give his Counsel any fee he may choose, but it is another thing to ask the other side to pay it; that is the principle on which the Taxing Officer has gone, and it is clearly wrong.

Mr. *Jackson* in reply.

PONTIFEX, J.—It was under the order of this Court that the commission in question was issued; and a subsequent order contains a direction for the payment of the costs of the commission. I do not think a judicial officer at Agra is bound to execute commissions issuing from the Court for the Relief of Insolvent Debtors without making a charge for so doing. With respect to the amount of the charge to be allowed, that is a matter for the Taxing Officer to consider, and depends on his discretion. If the judicial officer in the present case acted improperly in requiring or accepting payment for the execution of the commission, that impropriety is a matter between him and the Government, and not between him and the parties to the commission.

*With regard to the fee of ten gold mohurs, I do not think it would be a correct principle for the Taxing Officer to measure the amount to be allowed by the amount which the Official Assignee had paid his senior Counsel. The question for the Taxing Officer to consider is what was the fair and reasonable fee to be allowed for Counsel, regard being had to the nature and circumstances of the case.

With these directions the matter will go back to Mr. Belchambers. Costs of the present application will be reserved.

Attorney for Dabee Persaud: Mr. *Gregory*.

Attorney for A. B. Miller: Mr. *Dignam*.

Before Mr. Justice Maopherson.

JALEERAM v. CHUNDER COOMAREE DOSSEE AND OTHERS.

Mortgagor and Mortgagee—Sale of mortgaged Properties in Execution of Decree—Purchase by Mortgagee—Parties to join in the Conveyance—Practice.

1878
Sept. 11 &
Dec. 8.

Where a mortgagee becomes the purchaser of property sold under a decree for sale obtained by him on his mortgage, it is not necessary that the mortgagor should join in the conveyance of the property to the mortgagee.

THE plaintiff, a mortgagee, under a mortgage in the English form, having obtained a decree for an account and sale of the mortgaged premises, with the usual directions that all proper parties should join in the conveyance, and having obtained liberty to bid, became the purchaser at the sale. The defendants, the mortgagors, objected to execute the conveyance to him, and he thereupon called upon the Registrar to certify who were proper parties to join in the conveyance. The Registrar refused to certify that the mortgagors were proper parties, and the plaintiff, upon notice to the defendants, now moved for an order that the Registrar should certify who were the proper parties to join in the conveyance, that he should settle the same, and that the defendants should execute it when so settled, or, in their default, that the Registrar should execute it in their names, and on their behalf.

Annexed to an affidavit filed by him in support of his application was a minute by the Registrar, stating the grounds of his refusal, wherein he observed that, although it had always been the practice here to require the mortgagor to join in the conveyance when the purchaser was a third party, or to execute a release of the equity of redemption when the mortgagee was the purchaser, yet the practice was at variance with the practice in England, and was, moreover, attended with considerable expense, especially when the mortgagor, as usually happened, was recalcitrant. After referring to numerous authorities illustrating the English practice, the Registrar concluded as follows:—
“In the present case the equitable estate which was in the mortgagors has now vested in the mortgagee as a purchaser under a decree of this Court, in addition to the legal estate which was already in him. This completes his title, and, therefore, nothing further is required.”

Mr. R. Allen, for the plaintiff, while admitting that, on a sale under a decree of the Court of Chancery in England, the purchaser was not entitled to the concurrence of any persons, being parties to the suit, or otherwise bound by the proceedings therein, whose interests were merely equitable, observed that, in consequence of a different practice having prevailed in this country through a long course of years, it became necessary to obtain a distinct ruling of the Court in order to perfect the plaintiff's title.

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v.
CHUNDER
COOMAREE
DOSSEE.

The learned Counsel referred to the following cases:—*In the Matter of Williams' Estate* (1), *Keatinge v. Keatinge* (2), *Webber v. Jones* (3), *Cole v. Sewell* (4), and *Lechmere v. Clomp* (5).

The defendants did not appear.

Cur. adv. vult.

MACPHERSON, J.—This is a case of a mortgage in the English form. The mortgagee, plaintiff in this suit, got leave to bid at the sale held under the decree which he obtained, and he has been declared the purchaser. The equitable estate which remained in the mortgagor has passed to him under the decree and sale, and he, under his mortgage, already had the legal estate.

It appears to me that, under such circumstances, the practice which has prevailed here is wrong; it is causing additional trouble and expense, without being of any real benefit; for the title of the purchaser is complete without the mortgagor joining in the conveyance. Therefore I think the Registrar is right in the view which he has expressed. I have consulted the Chief Justice on the matter, and he is of the same opinion.

Attorney for the plaintiff: Mr. C. D. Linton.

Before Mr. Justice Markby and Mr. Justice Birch.

RAJAH NILMONEY SING DEO (PLAINTIFF) v. CHINIBAS
MAHANTI AND OTHERS (DEFENDANTS).*

1878
Sept. 1.

Judgments, Copies of, Delay in, furnishing—Act VIII of 1859, s. 198—Admission of Special Appeal.

In this case the plaintiff had applied to the Court of the Judicial Commissioner of Chota Nagpore for the admission of a special appeal, which application was refused on the ground that the time for the admission of the appeal had expired. It appeared that the plaintiff had applied for a copy of the judgment and decree which had been refused him on the ground that he had not put in a sufficient quantity of blank papers for copies.

From the decision of the Judicial Commissioner the plaintiff now appealed to the High Court.

Baboo Bhowanee Churn Dutt for the appellant.

No one appeared for the respondents.

* Application for admission of special appeal, from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 7th May 1878, affirming a decision of the Assistant Commissioner of Manbhoom, dated the 18th January 1878.

(1) 5 DeG. & Sm., 515.

(4)* 17 Sim., 40.

(2) 6 Ir. Eq. Rep., 48.

(5) 81 Beav., 578.

(3) *Id.*, 142.

The judgment of the Court was delivered by

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MARKBY, J.—We think that this appeal must be admitted. There appears to have been some delay in delivering out the copy of the decree and of the judgment owing to the appellant not having put in sufficient quantity of blank papers required for copies. But in point of law the Judicial Commissioner was not justified in delaying the giving of the copies until the blank papers were put in by the applicant; because s. 198 of Act VIII of 1859 requires that certified copies of the decree and judgment shall be furnished to the parties on the production of the necessary stamps; and by a Resolution of this Court dated the 6th July 1872 (1), which has been circulated to the District Judges and Judicial Commissioners, it is pointed out that, when stamps are put in by a party to the suit as required by s. 198, a copy of the decree and judgment must be furnished to him without further costs. It was clearly the intention of the Legislature that the stamp should cover all the costs of giving the copies asked for. The result is that the delay was entirely owing to the act of the Court, and not to the default of the appellant.

The appeal must be admitted.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

NUNDO COOMAR MOOKERJEE (DECREE-HOLDER) v. ISSUR
CHUNDER BHUTTACHARJEE (JUDGMENT-DEBTOR).*

1878
Nov. 17.

Limitation—Act IX of 1871, s. 1, & Sched. II, No. 167—Application for Execution of Decree.

THIS was an application made on the 13th of May 1872 for execution of a decree passed on the 13th May 1869. The lower Appellate Court held that execution was barred by the Limitation Act (IX of 1871), and the decree-holder then appealed to the High Court.

Baboo *Bungshee Dhur Sen* for the appellant contended that, inasmuch as the suit was instituted before the 1st of April 1873, the case was governed by the old law, as by s. 1 of Act IX of 1871, Parts ii and iii of the Act are not to apply to suits instituted before that date (2), and that the application therefore was in time. [JACKSON, J.—The operation of the Act is restricted only as regards suits, not as regards appeals and applications; see s. 4 of the Act, where the words used are different from those used in s. 1.]

* Miscellaneous Special Appeal, No. 158, against the order of the Judge of Zilla Jessore, dated the 21st February 1873, reversing an order of the Munsif of Khoolnia dated the 7th September 1872.

(1) 9 B. L. R., H. C. Rules, &c., 19.* July 1871, but that nothing contained in
(2) S. 1, Act IX of 1871; provides that ss. 2 and 8, or in Parts ii and iii, shall apply to suits instituted before the 1st April 1873.

1878

Mr. *H. E. Mendes* for the respondent was not called upon.

NUNDO
COOMAR
MOOKERJEE

The judgment of the Court was delivered by

v.
ISSUR
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BHUTTACHAR-
JEE.

JACKSON, J.—The decree in this case was passed on the 18th May 1869. The present application was made on the 18th May 1872. It was therefore an application made after the Limitation Act (IX of 1871) had come into force. It is not protected by the terms of s. 1 of the Act, therefore No. 167 of the second schedule of the Act applies; and as the application ought to have been made within three years, the period beginning to run from the date of the decree, it ought to have been made on or before the 12th May, when the three years had expired. The present application is consequently barred, and the appeal is dismissed with costs.

Before Mr. Justice Jackson and Mr. Justice Mitter.

1878
June 24.

SARBOREE KANTO BHUTTACHARJEE (ONE OF THE DEFENDANTS) v. ANADYA KANTO BHUTTACHARJEE (PLAINTIFF).*

Arbitration—Appeal—Act VIII of 1859, s. 325 (1).

THE facts of the case are sufficiently stated in the judgment of the Court.

Baboo *Hem Chunder Banerjee* (Baboo *Doorga Mohan Doss* with him), for the respondent, took the preliminary objection that by s. 325, Act VIII of 1859, no appeal would be in this case.

Baboo *Hurry Mohun Chuckerbutty* for the appellant.—The award is incomplete and does not decide all the matters referred. The arbitrators ought to have decided on all the issues submitted to them. Where there is no good award an appeal lies — *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (2).

JACKSON, J.—The suit before the Munsif related to two items claimed by the plaintiff, one being a piece of land which he claimed as his own, and the other a right of way which he asserted over the defendant's land. It appears that seven issues were fixed in the Munsif's Court for the determination of these questions. The parties then agreed to refer the matter to arbitration, and the suit was accordingly referred to three arbitrators. What is material to be noted here is that the arbitrators in coming to an award took up specifically some of the issues framed in the Munsif's Court, and declined to enter into

* Special Appeal, No. 822 of 1873, from a decree of the Judge of Nuddea, dated the 10th September 1872, affirming a decree of the Sudder Munsif of that district, dated the 29th December 1870.

(1) See *Gunga Narain Ghose v. Ram Chand Ghose*, *ante*, p. 43.

(2) 8 B. L. R., 215.

others. But they determined the two matters in issue between the parties, and having so determined them, and the award having been signed by all the three arbitrators, two of them appear to have subjoined a suggestion in respect of the questions which had been determined by them, to the effect that if the defendant would construct a certain pukka drain, the necessity for carrying out the award might not arise as the plaintiff would then suffer no injury. The Munsif, on receiving this award, dealt with the suggestion so added as surplusage, and he gave the plaintiff a decree in accordance with the award signed by the three arbitrators. The defendant appealed to the District Court after having first unsuccessfully applied to the Munsif for a review of his judgment. In appeal he contended that the award was not a legal award, and he sought to have the decree of the Court below set aside. The Judge found that the decree was in accordance with the award, and he considered himself precluded by the terms of s. 325 of the Civil Procedure Code from disturbing the decision of the Court below. It is contended here in special appeal that the award was incomplete, because the seventh issue was not decided, and also that the decree is not in accordance with the award, because it does not embody the final suggestion of two out of the three arbitrators. Now by s. 325 it is provided:—"If the Court shall not see cause to remit the award, or any of the matters referred to arbitration, for reconsideration in the manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall have refused such application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case, if the award shall have been submitted to it in the form of special case; and upon the judgment which shall be so given, decree shall follow, and shall be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award, the judgment shall be final." It is therefore the Court of first instance which determines—and it has full discretion in the matter—whether it will or will not remit the award for reconsideration, or set aside the award for any of the reasons stated in s. 324, and if it shall not see cause so to do, it shall proceed to pass judgment according to the award, and where it has so passed judgment, the judgment is final. It seems to me in this case that not merely did the Munsif refuse to remit or to set aside the award, but he did so for very good reasons. That being so, the judgment is in every sense final, and the District Judge was quite right in holding that he had no authority to interfere with that judgment in appeal.

The special appeal is dismissed with costs.

1873

SARBORRE
KANTO
BHUTTA-
CHAJEE
v.
ANADYA
KANTO
BHUTTA-
CHAJEE.

Before Mr. Justice Pontifex.

BUTLER v. LLOYD.

1874
Feb'y. 19.

*Act VIII of 1859, s. 281—Bad Faith—Arrest in Execution of Decree—
Application for Discharge.*

THE defendant, who had been arrested in execution of a decree for money obtained by the plaintiff, applied for his discharge on the ground that he had no present means of satisfying the decree.

Mr. *Lowe*, on behalf of the plaintiff, opposed the application. He proposed to show that the debt in respect of which the decree was obtained arose out of a breach of trust committed by the defendant, and that therefore he had been guilty of such an act of bad faith as disentitled him to be discharged. The words "bad faith" in s. 281, Act VIII of 1859, had received different interpretations. Phear, J., in *In re Soopersaud* (1), in a considered judgment, held that the acts of bad faith referred to in the section included acts of bad faith committed in incurring the liability, and this was followed by Norman, J., in *Smith v. Boggs* (2); see also *Passmore v. The Calcutta Docking Co.* (3). A contrary opinion was expressed by Macpherson, J., in *In re a Prisoner* (4), and again in *Oriental Bank v. Manimaqhab Sen* (5), and this view was also taken by Paul, J., in *In re Gurudas Bose* (6). Phear, J., is said to have altered his opinion in a case of *Jadu Charan Johani v. Gungadmal Paul*, which, however, is not reported.

Mr. *Brunson* for the defendant.—The balance of authorities is in favor of the view taken by Macpherson, J. The words of s. 281 clearly show that the acts of bad faith referred to are acts done for the purpose of obtaining the discharge.

PONTIFEX, J.—If there were no conflict of authority, I should have had no difficulty in following Macpherson, J.'s interpretation of this section. The last three decisions on the section are those of Macpherson, Paul, and Norman, JJ. Norman, J., does not decide the point; and Paul, J., follows Macpherson, J., who adheres to his former decision that no bad faith, except bad faith in respect of the application, can be gone into, and I agree with him (7).

Attorneys for the plaintiff: Messrs. *Berners, Sanderson, and Upton.*

Attorney for the respondent: Baboo *Bolye Chund Dutt.*

(1) 2 I. J., N. S., 91.

(2) 5 B. L. R., App., 22.

(3) Bourke's Rep., Pt. VII, 74.

(4) 1 I. J., N. S., 8.

(5) 8 B. L. R., App., 14.

(6) 7 B. L. R., App., 28.

(7) After delivering the above judg-

ment, His Lordship stated that he had mentioned the point to Phear, J., who said that to the best of his recollection he had decided a case in accordance with the view of Macpherson, J., subsequently to the case of *In re Soopersaud* (2 I. J., N. S., 91).

Before Mr. Justice Pontifex.

BROOKE *v.* SURDYAL AND ANOTHER.

Arbitration—Agreement to refer—Refusal of Arbitrator to act—Act VIII 1874
March 2.
of 1859, ss. 319 & 326.

Where parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court.

IN this case a rule had been issued calling on the defendants to show cause why a certain agreement, by which the parties had consented to refer all matters in dispute between them to three arbitrators therein named, should not be filed in Court. The deed, which was duly signed and executed by the parties thereto, provided that the award was to be the award of the three arbitrators therein named, but no provision was made for a difference of opinion between the arbitrators, or for the appointment of an umpire, or of other arbitrators in case any of the arbitrators thereby appointed should refuse or become incapable to act. The award was to be made by the 8th of February, but it was admitted that the time had been extended by the arbitrators under a provision in that behalf. On the 20th February, in reply to a letter from the defendants' attorneys, Mr. Moncrieff, one of the arbitrators, informed them that Mr. Betts, another arbitrator, refused to act, and therefore the arbitration was at an end, and on the same day the attorney of the arbitrators sent them a formal notice to the same effect. On the 21st February an application was made to the Court, on the petition of the plaintiff, for an order that the agreement of reference should be filed in Court under the provisions of Act VIII of 1859, s. 326, and eventually a rule was issued calling on the defendants to show cause why the agreement should not be filed.

Mr. *Branson* showed cause. He contended that, on the date on which the application was made, there was, in fact, no agreement for arbitration in existence, inasmuch as before that date one of the arbitrators had refused to act, and the other arbitrators had given notice that the arbitration was at an end. [PONTIFEX, J.—Do not the words in the last part of s. 326 refer to s. 319, and make it applicable to this case?] No; they simply lay down the rules that shall be followed when the agreement for reference has been filed in Court; but here there is no agreement to file. S. 319 refers to a case where the Court has directed the reference; that is, suppose this agreement had been filed while the parties were bound by it, then, if an arbitrator refused to act, the Court might appoint another.

1874

BROOKE
v.
SUDYAL.

Mr. *Phillips*, in support of the rule, contended that the plaintiff had a right to have the agreement filed. No cause had been shown against it. The latter words of s. 326 clearly made all the provisions of Ch. vi of Act VIII of 1859 applicable to such a case, and under those provisions the Court could, if it thought right, appoint another arbitrator in place of the one who refused to act.

PONTIFEX, J.—In this case there has been an agreement for reference to three arbitrators, one of whom has refused to act, and the other two have declined to go on with the reference. The application now made to me is under s. 326 to file the agreement; but this is clearly only preliminary to a further application under s. 319 for the appointment of a new arbitrator. After an agreement such as that now before me has been executed, any person who is a party to it is entitled to apply to the Court to have such agreement filed, and no party to such an agreement could hope successfully to oppose such application if all the arbitrators named in it were alive and willing to act. But it is quite a different thing when, upon making such an application, a party to the agreement is able to come in and show that, before the application was made, one of the arbitrators named in the deed had, in fact, died, or, as in this case, had refused to act in the matter. In such a case, I think, the contention is right that the reference to the arbitration agreed upon between the parties no longer exists, so as to enable the Court to direct that it should be filed; and if it were filed, I do not think the Court could exercise the power of appointing a new arbitrator, because the arbitrator, who has refused to act, refused before the order of reference, directed by s. 326, was made by the Court.

I refuse this application, therefore, on the ground that I cannot carry out the directions of s. 326, "the agreement shall be filed, and an order of reference to arbitration shall be made thereon," as by the refusal of one of the arbitrators named in the agreement to act it is no longer possible to make an order of reference under the agreement. But I shall, under the circumstances, make no order as to the costs of this application.

Attorney for the plaintiff: Mr. *H. C. Chick*.

Attorneys for the defendants: Messrs. *Robertson, Orr, Harris, and Francis*.

Before Mr. Justice Phear and Mr. Justice Morris.

THE QUREN v. AMANULLA.*

1874
March 16.

Criminal Procedure Code (Act X of 1872), s. 249—Evidence of Witnesses before the Committing Officer.

UPON the trial of the prisoner for the murder of his wife and infant child, the witnesses for the prosecution gave evidence contradicting the evidence given by them before the Committing Magistrate.

The Sessions Judge, purporting to act under s. 249 of Act X of 1872, discarded the evidence taken before himself, and grounded his judgment on the evidence given before the Magistrate, and upon this evidence he convicted the prisoner and sentenced him to death.

The prisoner appealed to the High Court.

Baboo Bhuggobutty Churn Ghose for the appellant.

PHEAR, J. (after stating the facts and various portions of the evidence adduced on behalf of the prosecution, continued).—Now it is remarkable that all these witnesses, not even excepting the chowkedar, told different stories altogether before the Sessions Court from those which they told before the Deputy Magistrate,—different in material points. Ashirun, Upasha, and Duri had their depositions read to them, and denied the truth of the statements which they made before the Deputy Magistrate. It is quite clear then that these witnesses are in themselves untrustworthy. Their testimony before the Sessions Court could not be relied upon, nor did it make out the case which the prosecution came into Court to establish. There was one other witness besides those that I have spoken of, namely, the Superintendent of Police, who searched Amanulla's house some fifteen or sixteen days after the occurrence, and spoke to traces of blood in various places. I shall have occasion to remark more particularly upon his evidence presently. It is enough for the present moment to say that, even taking it at the utmost which it can be worth, we think this man's testimony does not supply the defects apparent in the testimony of the other witnesses. The Sessions Judge perceived that the case for the prosecution was not made out by the testimony given before the Sessions Court, and he expressed his opinion that the principal witnesses had then perjured themselves. Indeed, two, if not three, of them he directed to be sent before the Magistrate upon a charge of giving false evidence. Nevertheless, he convicted the prisoner of murder, and sentenced him to be

* Criminal Appeal, No. 182 of 1874, against the order of the Sessions Judge of Rungpore, dated the 14th February 1874.

1874

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v.
AMANULLA.

hanged. This is certainly a somewhat startling result, and he arrived at it in the following way. After making some analysis of the testimony of the witnesses before him, and contrasting it with the depositions which they had made before the Deputy Magistrate, he says: "From the above abstract of the evidence of the witnesses as given before the Committing Officer and before this Court, it is evident that the two sets of evidence are contradictory and inconsistent with each other. The question now is whether the whole evidence ought to be treated as untrustworthy on the ground of those contradictions and inconsistencies, or whether a portion of it should be relied upon and made the basis of my judgment in the case? Now, as regards the evidence given by the witnesses before the Committing Officer, it must be observed that, at the time when they were examined by that Officer, they were apparently free from all external influence, and would have deposed to nothing but what they had witnessed; while, on the other hand, when they gave their evidence before this Court, those interested in bringing about the prisoner's acquittal had had ample opportunity of tampering with the witnesses, and the witnesses themselves had also sufficient time to think over the consequences of their evidence. I have, therefore, very carefully considered both these sets of evidence, and have duly weighed the circumstances under which each was given, as also the arguments urged against its credibility by the prisoner's Counsel, and the conclusion at which I arrive is, that the testimony of the witnesses as given before the Committing Officer is to be believed, and I do accordingly believe it, and acting under the provisions of s. 249, Criminal Procedure Code, I ground my judgment thereon."

In other words, the Judge founds his conviction of the prisoner on the charge of murder upon the testimony which was given before another judicial officer, not before himself, by the very persons who, according to his own view, before him showed themselves, in the very same matter, to be utterly unworthy of belief. Even if s. 249 warranted the Court in taking such a step as this, it seems to me certainly an inordinately long step to take. And I might almost say that the logical consequence would be that the taking of evidence in the Sessions Court might be altogether dispensed with. For if it is legitimate, proper, and safe that the Sessions Court should come to a verdict against the prisoner upon the evidence given before the Magistrate by witnesses who before the Sessions Court denied that evidence and showed themselves unworthy of belief, *a fortiori*, it would be right, proper, and safe for the Sessions Court to found its judgment upon the evidence given before the Magistrate in those cases where the witnesses afterwards confirm that evidence by the testimony which they give in the Sessions Court. And I think that this very obvious consequence shows very conclusively that the Judge misapprehended the true scope of s. 249 of the Criminal Procedure Code. That section runs in these words:—"When a witness is produced before the Court of Session, or High Court, the evidence given by him before the Committing Magistrate may be referred to by the Court, if it was duly taken in the

presence of the accused person; and the Court may, if it think fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith."

It appears to me that the Legislature in framing this enactment desired merely to authorize the Court to take a particular statement made by a witness before the Committing Magistrate as the true statement, notwithstanding that it was denied, or a statement inconsistent therewith was made by the witness before the Court itself, if the Court could see from the evidence of that same witness before itself, or of other witnesses before itself, that the original statement was worthy of belief;—not that the Court should discard wholly the testimony of witnesses given before it, and have recourse to the testimony of the same persons which was given elsewhere before another judicial officer on the occasion of making the investigation preliminary to the final trial. The discretion which is conferred by the passage "if the Court thinks fit" in s. 249, is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not, as was the case here, upon mere speculation or conjecture.

I think, therefore, that the prisoner ought not to have been convicted, and that the sentence of the Sessions Court should be set aside and the prisoner discharged.

MORRIS, J.—I quite agree in the view of the evidence taken by my learned colleague in this case. I also think that it was not safe to convict the accused Amanulla solely on the evidence given by the witnesses before the Magistrate—witnesses whom the Judge considered had perjured themselves before him. It seems to me that, under s. 249 of the Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself. Nor can it be said that the Police Officer or any other witness before the Court of Session affords independent testimony corroborative of the evidence given before the Magistrate. It is most unfortunate that so much valuable time was lost in the prosecution of this case. The Police Officer who made the first enquiry considered that the mother and child had died of cholera, and that the case was not one of murder; and certainly on the evidence, as it now comes before us, I think it impossible to say that there is any certainty in regard to the mother and child having been murdered by the prisoner. I therefore concur in ordering the discharge of the prisoner.

1874

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v

AMANULLA.

Before Mr. Justice Markby and Mr. Justice Burch.

1874
Jany. 8.

NEEL KANTO PANDIT AND OTHERS (PLAINTIFFS) v. JUGGOBUNDHOO GHOSE
AND OTHERS (DEFENDANTS).*

Evidence Act (I of 1872), ss. 60 & 67—Proof of Execution of Deed.

THE plaintiffs in this case sued for a share of a garden on the allegation that Juggobundhoo, one of the defendants, dispossessed their father ten years ago. Juggobundhoo stated that his brother Rashbehary Ghose had purchased the garden in 1266 (1860) from the plaintiffs' father, and that he and his brother had been ever since in possession.

The defendants in the Munsif's Court produced a bill of sale which purported to have been executed by the plaintiffs' father; and to prove this document they called a Cazi, who deposed that the plaintiffs' father came before him accompanied by witnesses, and acknowledged the execution of the deed, which was then registered.

The Munsif decided that the defendants had failed to make out their purchase, inasmuch as they had not proved the payment of any consideration-money, and he accordingly decreed the suit.

From that decision the defendants appealed, and the lower Appellate Court, believing the evidence of the Cazi, and being of opinion that the bill of sale was thereby proved, allowed the appeal.

The plaintiffs appealed to the High Court.

Baboo Bama Churn Bannerjee, for the appellants, contended, that the bill of sale was not sufficiently proved: direct evidence of the executant's handwriting ought to have been produced—s. 67 of Act I of 1872. That Act requires primary evidence of the signature of a person who is alleged to have signed a deed.

Baboo Kally Prosonno Dutt, for the respondents, was not called upon.

The judgment of the Court was delivered by

MARKBY, J.—It appears that in this case the evidence which was given in support of the document upon which the defendants' case depends was that of a Cazi before whom the vendor came and admitted the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof, and in fact going pretty much through the same forms as are now in force under the Registration Act. Upon that evidence the lower Appellate Court very naturally came to the conclusion that the deed was proved, and the only question which we have to consider is, whether the Court was precluded from doing

* Special Appeal, No. 740 of 1878, against the decree of the Officiating Judge of East Burdwan, dated the 28th February 1878, reversing the decree of the Munsif of Culna, dated the 30th November 1872.

so by s. 67 of the Evidence Act. Now it is contended that that section renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. But that is not so expressly stated in the section, and it does not appear to me that that was the intention of the Legislature. It seems to me that that section merely states with reference to deeds what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given. In that respect the rule is precisely the same as it stood before. It leaves it as before entirely to the discretion of the presiding judge of fact to determine what satisfies him that the document is a genuine one.

It may perhaps be thought that s. 60 has some bearing on this question. But I think it has not. That section provides that when it (*i.e.*, the oral evidence) refers to a fact which could be seen, it (*i.e.*, the oral evidence) must be the evidence of a witness who says he saw it. This last "it" is somewhat indefinite; but I think that this "it" has reference to the "fact" previously spoken of; and I think the fact previously spoken of is the fact deposed to, and therefore not always the fact which it is ultimately intended to prove. In other words, I do not think it was intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning.

The special appeal is dismissed with costs.

Before Mr. Justice Macpherson.

HALFORD v. THE EAST INDIAN RAILWAY Co.

Pleading—Offer without Prejudice—Act VIII of 1859, s. 124.

1874
Feb'y. 6.

THIS was an application by the defendants for an order under s. 124, Act VIII of 1859, directing the removal from the file, or the amendment of, the plaintiff's written statement on the ground that it contained irrelevant matter, namely, letters containing and relative to an offer made by the defendants without prejudice.

The action was brought to recover damages for the destruction of the plaintiff's bungalow by reason of alleged negligence on the part of the defendants.

In his written statement the plaintiff set out in full certain letters written by and to the defendants upon the matter in dispute. In one of these letters the defendants, after denying their liability, said,—“They” (*i.e.*, the defendants) “are, however, willing to offer you, without prejudice, the sum of Rs. 1,000 in full of all demands.” In answer to this the plaintiff's attorneys wrote,—“Mr. Halford, while claiming his right to be indemnified for the loss he has

1874 sustained, has no wish to make any profit thereby, but he cannot put up with
 HALFORD such a loss as an acceptance of your offer would entail, which he declines."
 v. In another letter the defendants said,—“The agency are not prepared to
 EAST INDIAN increase the offer (without prejudice) which they have made.”
 RAILWAY CO.

Mr. *Evans*, on behalf of the defendants, contended that these letters, or so much of them as related to the defendants' offer, ought to be expunged from the plaintiff's written statement as being irrelevant; 1 Taylor on Evidence, s. 720; *Jones v. Foxall* (1); *Kasublal Day v. Tremearne* (2); and the Evidence Act (I of 1872), s. 23. The costs of this application should be borne by the plaintiff; *Christie v. Christie* (3). There the matter objected to was scandalous, but the Lord Chancellor states the principle generally that the offending party must pay to the other parties the whole expense to which they have been put by his introduction of matter foreign to the suit, and which is of such a nature that it ought to be expunged at once.

Mr. *Lowe*, for the plaintiff, contended that under the Civil Procedure Code the written statement was to be a complete narration of the facts; that in the letter containing the offer the defendants for the first time repudiated all liability, it was therefore the letter upon which the plaintiff was compelled to come into Court; that if the whole letter had been written without prejudice, the case might have been different, but the plaintiff was not bound to decide what portions of the letter were or were not evidence; and that the case of *Christie v. Christie* (4) being decided with respect to scandalous matter was inapplicable.

Mr. *Evans* was heard in reply.

MACPHERSON, J., observed that there was no doubt that an offer made without prejudice should be omitted from the pleadings, and that there was also no doubt that such portions of these letters as contained or related to the defendants' offer might, and ought to, have been omitted. He accordingly ordered the paragraphs relating to the offer to be struck out of the plaintiff's written statement, and that the defendants should have the costs of the application.

Attorneys for the plaintiff: Messrs. *Berners, Sanderson, and Upton*.

Attorneys for the defendants: Messrs. *Chauntrell, Knowles, and Roberts*.

(1) 15 Beav., 888.

(8) L. R., 8 Ch., 499; see p. 506.

(2) 8 B. L. R., App., 12.

(4) *Id.*, 499.

IN THE GOODS OF JULIA ORAM, DECEASED.

1874
Feby. 9.*Court Fees Act (VII of 1870), Sched. I, No. 11—Appointment by Will.*

Where a person having a life interest in a fund with a general and absolute power of appointment thereover exercises such power by will, no *ad valorem* fee is payable in respect of such fund under the Court Fees Act (VII of 1870).

CASE referred to the Chief Justice under s. 5 of the Court Fees Act, 1870, by Mr. R. Belchambers, the Taxing Officer.

"It appears that under the will of General Stephen Davis Riley (which was proved in this Court on the 5th of July 1867), Julia Oram, lately deceased, had a life interest in Rs. 10,000, with a general and absolute power of appointment over that sum. This power of appointment she has exercised by her will, of which the Administrator-General, as ex-officio executor, has now applied for probate; and, on the authority of *Platt v. Routh* (1), which was affirmed by the House of Lords, *Drake v. The Attorney-General* (2), it is claimed on behalf of the Administrator-General that no probate duty is payable on the Rs. 10,000.

"The case cited was a decision on 55 Geo. III, c. 184, s. 38, the words of which ('the estate and effects of the deceased for, or in respect of which the probate or letters of administration is or are to be granted') are similar to the words of the Court Fees Act, 1870, sched. i, cl. 11 ('Two per centum on the amount or value of the property in respect of which the probate or letters or certificate shall be granted.'). In that case the power of appointment was treated as general and absolute, and the property appointed was treated as belonging to the estate of the person by whom the power of appointment was created, and not to the estate of the person making the appointment.

"There is no distinction between that case and the present one, except that in that case probate duty had been paid on the property appointed when probate was obtained of the will which created the power of appointment, whereas in the present case no probate duty has been paid on the Rs. 10,000, the will of General Riley, which created the power of appointment over that sum, having been proved when only a fixed fee of Rs. 10 was payable under the Succession Act, and before any *ad valorem* fee was required to be paid.

"It has been held that the payment of the fee of Rs. 10 is not equivalent to the payment of the *ad valorem* fee—*In the Goods of W. G. Chalmers* (3).

"By 23 and 24 Vict., c. 15 (passed since the decision in *Drake v. The Attorney-General* (2)), it is provided (s. 4) that probate duty shall be levied and paid on personal property appointed by will under general power, and (s. 5) that the same shall be a charge or burden upon such property. There is no similar provision in this country."

(1) 6 M. & W., 756.

(2) 10 Cl. & Fin., 257.

(3) 6 B. L. R., App., 187.

1874

The opinion of the Chief Justice was as follows:—

IN THE GOODS
OF JULIA
ORAM.

COUCH, C.J.—I think the *ad valorem* fee is not payable. If the words in the Schedule were construed so as to make it payable, the serious difficulties referred to by the Court of Exchequer in *Platt v. Routh* (1) would arise. There is no provision in the Court Fees Act to make the *ad valorem* fee a charge upon the Rs. 10,000.

Before Mr. Justice Markby and Mr. Justice Birch.

1878
Dec. 16.

QUEEN v. HATU KHAN.*

Criminal Procedure Code (Act X of 1872), ss. 296, 297—Powers of High Court—Sentence of Acquittal.

In this case, in which the accused was charged under ss. 141, 441, and 352 of the Penal Code, the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor, two of whom at least were present at the trial, and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Criminal Procedure Code.

* The Magistrate, being of opinion that such judgment was illegal, reported the case and forwarded the record thereof to the High Court under s. 296 of the Criminal Procedure Code, with a request that that Court would pass "an order directing the retrial of the accused with observance of the proper procedure."

The judgment of the High Court was delivered by

MARKBY, J.—We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a retrial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that clause.

* Criminal Reference from the Officiating Magistrate of Bograh, dated the 12th November 1878.

HIGH COURT CIRCULARS, &c.

HIGH COURT CIRCULARS, &c.

It is ordered that the following Rule be read and passed as a Rule of the High Court of Judicature at Fort William in Bengal, Original Jurisdiction, to take effect from the 22nd day of August 1873:—

Documents and books produced with a plaint shall be produced at the same time as the plaint is presented to the Court, by the plaintiff or his Attorney, already marked alphabetically, and with the entries on which the plaintiff relies in each book already marked numerically, and with the words “produced with the plaint in suit No. of 187 , this day of 187 ,” already written after the mark on each document, book, or entry.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
DWARAKANATH MITTER.
CHARLES PONTIFEX.
G. BIRCH.
G. G. MORRIS.

RULES FOR ADMISSION OF VAKEELS IN THE HIGH COURT.

1. Every person, before being admitted to practise as a vakeel in the High Court, shall have obtained the degree of Bachelor of Laws in the University of Calcutta, Madras, or Bombay.

2. Except as mentioned in Rules 20 and 23, every person, before being admitted as a pleader in the High Court, shall serve a regular clerkship to some attorney or vakeel of the High Court, to be approved by the Court before the contract

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RULES.

is entered into, under Articles of Clerkship by contract in writing pursuant to the Rules hereinafter contained, for the full period of two years.

3. The term of service required by the last preceding Rule need not be all under one and the same contract, nor to one and the same person, but may be to different persons by virtue of an assignment or assignments, or by virtue of successive independent contracts, upon the dissolution of the original, or succeeding contract.

4. The person under whom the Articles shall be served shall, during the whole period of the service, be actually practising as an attorney or vakeel in the High Court.

5. No person, who is himself acting as clerk to an attorney or vakeel, shall be able to take any clerk for service under Articles.

6. No person shall be capable of service under these Rules until he shall have passed the B.A. Examination of the University of Calcutta, Madras, or Bombay.

7. The contract in writing, whereby a person shall engage as aforesaid to serve as a clerk to any attorney or vakeel, shall be filed with the Registrar of the High Court on the Appellate side, within one calendar month after the execution of the same, together with an affidavit by such attorney or vakeel that he has been himself duly admitted, and has been practising for five years as an attorney or vakeel, and that such contract has been duly executed by himself and by the clerk therein mentioned. And in every such affidavit shall be specified the name of the attorney or vakeel, and his place of abode or business, and the name of the clerk and his place of abode, together with the day on which the contract was actually executed.

8. In case the Articles of Clerkship shall be assigned, the assignment shall be in writing, and shall be in like manner filed within one calendar month after the execution thereof, together with an affidavit that the same has been executed by all the necessary parties. And in every such affidavit shall be specified the name of the attorney or vakeel to whom the Articles are assigned, and his place of business, together with the day on which the assignment was actually executed.

9. If by reason of death, or for any other good and sufficient reason, an assignment of the Articles cannot be obtained, a fresh contract in writing shall be entered into by the clerk with the person under whom the service is continued, which shall be filed in the manner and with the affidavit prescribed by Rule 8.

1874
RULES.

10. In case the contract or assignment, together with the necessary affidavit, be not filed within the time specified, the same may be filed with the said Registrar after the expiration thereof; but the service of such clerk shall be reckoned to have been commenced or renewed from the date of filing such contract or assignment unless the Court shall otherwise order.

11. Every person who shall be articulated to serve as a clerk to a vakeel or attorney for the purpose of being admitted as a vakeel shall, during the whole period of such service, continue, and be really and actually employed by such attorney or pleader in the proper business, practice, and employment of an attorney or vakeel.

12. Before any person shall be admitted as a vakeel in the High Court, he shall sign and file with such Registrar as aforesaid answers to the questions contained in the Schedule A, hereunto annexed; and the person or persons under whom he shall have served his Articles shall sign and file answers to the questions contained in the Schedule B, hereunto annexed, as also a certificate in the form given therein.

13. In case the applicant should show sufficient cause to the satisfaction of the Court why the last Rule cannot be fully complied with, it shall be in the power of the Court to dispense with any part of this Rule which it may think fit and reasonable.

14. The applicant shall in all cases produce satisfactory testimonials as to his good character.

15. The applicant shall also, if required, sign and leave with the said Registrar answers in writing to such other questions as shall be directed by the Court touching the service and conduct of the applicant, and also, if required, attend the Court personally for the purpose of giving further explanation touching the same; and shall also, if required, procure the attendance of the person or persons with whom he shall have served his clerkship as aforesaid, to answer either personally or in writing

1874

RULES.

any questions touching such service or conduct, or shall make proof to the satisfaction of the Court of his inability to procure the same.

16. Upon compliance with the aforesaid Rules, if the Court shall be satisfied, as to the fitness and capacity of the applicant, a certificate shall be granted to him in the following form:—

In pursuance of the Rules of the High Court relative to the admission of vakeels, it is hereby certified that A. B. has complied with the requirements of the said Rules, and that he is a fit and proper person to be admitted to practise as a vakeel in the High Court.

(Sd.) C. D.,

A Judge of the High Court.

17. Any person intending to apply to be admitted to practise as a pleader in the High Court shall also give one month's notice in writing to the Registrar aforesaid stating his intention, and shall also insert in the *Calcutta Gazette* a like notice for four successive weeks prior to his application.

18. Any person who has been admitted to the degree of B.L. in the University of Calcutta, Madras, or Bombay, and who shall produce the certificate mentioned in Rule 16, shall, after giving the notice required by Rule 17, be enrolled as a vakeel of the High Court.

19. Any person who has been admitted to the degree of B.L. in the University of Calcutta, Madras, or Bombay, and who shall prove to the satisfaction of the Court that he has *bona fide* practised four years as a pleader in one or more of the Courts of the mofussil, subject to the jurisdiction of the High Court, and that he is a person of good character, may, after giving the notice required by Rule 17, be admitted to practise in the High Court as a vakeel without service under Articles.

20. Every person applying to be admitted under the last Rule shall, one month prior to admission, leave with such Registrar, as aforesaid, answers to the questions contained in the Schedule C., hereunto annexed, and also a certificate or certificates in the form contained in Schedule D., hereunto annexed.

21. In case the applicant should show sufficient cause to the satisfaction of the Court why the last Rule cannot be complied with, it shall be in the power of the Court to dispense with any part of this Rule upon such terms as it may think fit and reasonable.

22. An applicant under Rule 19 shall in all cases produce satisfactory testimonials as to his good character; and shall also, if required, leave with the said Registrar answers in writing to such questions as the Court shall direct touching the qualification of such person to be admitted as a vakeel in the High Court; and shall, if required, attend the Court personally for the purpose of giving further explanation touching the same.

23. Any attorney of the High Court, who shall establish to the satisfaction of the Court that he has *bond fide* practised as such for the period of three years, and that he is a person of good character and ability, may be admitted to practise in the High Court as a vakeel.

24. These Rules shall come into force on the 1st day of January 1874.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
DWARKANATH MITTER.
O. PONTIFEX.
E. G. BIRCH.
G. G. MORRIS.

11th September 1873.

SCHEDULE A.

Questions as to due Service of Articles to be answered by the Applicant.

1. What was your age at your last birthday?
2. Have you served the whole term of your Articles at the place where the person or persons to whom you were articled or assigned carried on his or their business? and, if not, state for what reason.

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3. Have you, at any time during the term of your Articles, been absent without the permission of the person or persons to whom you were articulated or assigned? and, if so, state the length and occasions of such absence.

4. Have you, during the period of your Articles, been engaged or concerned in any, and, if any, what profession, business or employment, other than your professional employment, as clerk to the person or persons to whom you were articulated or assigned?

5. Have you, since the expiration of your Articles, been engaged or concerned, and for how long a time, in any, and, if any, what profession, trade, business or employment, other than the profession of an attorney or vakeel?

SCHEDULE B.

Questions to be answered, and Certificate to be given, by the Person or Persons with whom the Clerk may have served any part of his time under Articles.

1. Has A. B. served the whole period of his Articles at the place where you carry on your business? and, if not, state the reason.

2. Has the said A. B. at any time, during the period of his Articles, been absent? and, if so, state the length and occasions of such absence.

3. Has the said A. B., during the whole period of his Articles, been engaged or concerned in any, and, if any, what profession, business or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B. during the whole period of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney [or vakeel, as the case may be]?

5. Has the said A. B., since the expiration of his Articles, been engaged or concerned, and for how long a time, in any profession, trade, business or employment, other than the profession of an attorney or vakeel?

And I do hereby certify that the said A. B. has duly and faithfully served under his Articles of clerkship [*or assignment of Articles, as the case may be*] bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

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SCHEDULE C.

1. What was your age last birthday?
2. What is the date of your enrolment as a pleader, and where were you enrolled?
3. Have you practised in one or several Courts? State the periods during which you practised in each, and the dates of the beginning and end of each period.
4. Have you at any time been engaged or concerned, in any, and, if any, what profession, business or employment, other than that of a pleader? If so, when, and for what period?

SCHEDULE D.

I, C. D., District Judge [*or Subordinate Judge, or Munsif, as the case may be*] do certify that to the best of my belief A. B. practised in my Court regularly as a pleader from the day of 18 to the day of 18, and that he was diligent and faithful in the performance of his duties, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

(Signed) C. D.

Rules drawn up in accordance with s. 4, Act XX of 1865, for the Qualification, Admission, and Enrolment of Pleaders and Mookhtars in Mofussil Courts.

1. Pleaders in the Mofussil Courts of the Regulation Provinces, within the limits of the jurisdiction of the High Court, shall, as regards qualification, be of two grades.

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2. Those of the higher grade shall be competent to appear, plead, and act in any Civil or Criminal Court subordinate to, and within the limits of, the general jurisdiction of the High Court, and also before the Board of Revenue, or in any Revenue Court or office within the said limits: provided that they shall not appear, plead, or act in the High Court.

3. Those of the lower grade shall be competent to appear, plead, and act in the Courts of Munsifs, and in Small Cause Courts, and in the Courts of Officers in the District of Cachar, and the Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Munsifs, under the Bengal Civil Courts Act, 1871.

4. Mookhtars duly admitted and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear, and act in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits: provided that they shall not appear, plead, or act in the High Court.

5. The Examiners hereinafter mentioned shall be the persons appointed to be Examiners by the Lieutenant-Governor of Bengal, under the provisions of Act XX. of 1865.

Qualifications for Pleaders of the higher Grade.

6. Every person may be admitted as a pleader of the higher grade, who shall be qualified as hereinafter prescribed, that is to say—

1st.—If he shall have obtained the degree of Bachelor of Law of one of the Universities of Calcutta, Madras, or Bombay, or shall be a Licentiate in Law of one of the said Universities: provided that his application for admission as a pleader be made within one year from the time of his obtaining such degree or license, or within such further time as the High Court shall for any special reason allow; or

2nd.—If he produce a certificate from the Examiners that he has passed in the first class an examination in the subjects prescribed from time to time by the High Court for such

examination, Such subjects shall, until further order by the Court, be as follows :—

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HIGHER GRADE.

Subjects.

Regulations, Enactments, and Text-books.

1st.—The law of property current in Bengal :—

A.—With reference to the permanent settlement; to the Government lien on land; to claims to hold land exempt from the payment of revenue; and to the mode in which estates can be brought to sale for arrears of revenue.

B.—The law of under-tenures, and the mode in which the same can be brought to sale for arrears of rent.

C.—The relation of landlord and tenant.

D.—Mortgages, Registration of Assurances.

E.—The Hindoo Law of Inheritance, Succession, and Adoption.

F.—Mahomedan Law.

G.—The Indian Succession Act.

2nd.—Obligations arising from contracts.

3rd.—Civil Procedure.

4th.—The Law of Evidence.

5th.—The Law relating to Stamps.

6th.—The Law of Limitation.

7th.—Criminal Law and Procedure.

Regulations (Bengal) I, VIII, X, XIV, XIX, and XLIV of 1793, and the Regulations and Acts by which the same have been altered; Act XI of 1859, and the preamble to Regulation (Bengal) II of 1793.

Regulations (Bengal) VIII of 1819; Act VIII of 1865 (Bengal Council); Act VIII of 1869, B.C. (except as to candidates to practise in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X. of 1859).

Act VIII of 1869, B.C., except as above.

Macpherson on Mortgages; Act VIII of 1871.

Dayabhaga and Mitakshara; Dattaka Chandrika, and Macnaghten's Principles of Hindoo Law, first seven chapters.

Macnaghten's Principles of Mahomedan Law, except Chapter 9.

Act X of 1865; Act XXI of 1870.

Macpherson on Contracts; Act IX of 1872.

Act VIII of 1859; Act XXIII of 1861; Act XI of 1865.

Act I of 1872.

Act XVIII of 1869; and Act VII of 1870.

Act IX of 1871.

The Indian Penal Code (Act XLV of 1860; Act XXVII of 1870), and the Code of Criminal Procedure, Act X of 1872.

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7. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

8. In order to qualify a person to present himself for the examination required by these Rules for the higher grade—

1st.—He must hold a certificate of having passed the First Arts Examination of the University of Calcutta, Madras, or Bombay, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the abovementioned examinations.

2nd.—He must hold a certificate of having regularly attended a full course of Lectures in Law at one of the Colleges affiliated to the Calcutta University, or such Law Lectures elsewhere as shall be deemed by the High Court to be sufficient.

3rd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

9. Every candidate for examination for the higher grade shall, on or before the 1st of November in each year, give notice to the Secretary to the Board of Examiners of his intention to present himself at the ensuing examination, and he shall establish to their satisfaction that he possesses the qualifications declared by Rule 8 to be necessary for such candidates.

10. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a register, with a certificate to the effect that the Examiners are satisfied that he possesses the necessary qualifications.

11. Before the date of examination, every candidate for the higher grade shall pay a fee of Rs. 30 into the Government Treasury at Calcutta, and shall produce to the Examiners the receipt for the said sum of Rs. 30.

12. Any person who shall have passed the examination as a pleader of the higher grade, or who shall have obtained the degree of Bachelor in Law of one of the Universities of Calcutta, Madras, or Bombay, or of Licentiate in Law of one of the said Universities, and who shall desire to be admitted to practise, shall pay into the Government Treasury of the District in which he shall intend to practise Rs. 25, and shall, on presentation of the certificate of the Examiners or of his diploma, and the receipt for the said sum of Rs. 25, be entitled to apply to the High Court for admission and enrolment.

13. The application, together with the certificate and receipt required by Rule 12, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

14. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court-house of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

15. The High Court may call for evidence of the respectability of the applicant in any case in which it may be deemed necessary.

16. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant, in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

Qualifications for Pleaders of the lower Grade.

17. Every person may be admitted as a pleader of lower grade who shall produce a certificate from the Board of Examiners that he has passed in the second class an examination in

1874

RULES.

the same subjects as are prescribed for pleaders of the higher grade under the provisions of Rule 6.

18. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

19. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the entrance examination of the University of Calcutta, Madras, or Bombay in the first or second class, or the first public examination before Moderators at Oxford, or the previous examination in Arts in one of the Scotch Universities, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

20. Every candidate for examination for the lower grade shall, on or before the 1st November in each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to the satisfaction of the said Examiners that he possesses the qualifications declared by Rule 19 to be necessary for such candidates.

21. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age in a register, with a certificate to the effect that they have been satisfied that he possesses a necessary qualification, and shall furnish the candidate with a copy of, or an extract from, the said register.

22. Before the date of examination every candidate for the lower grade shall pay a fee of Rs. 20 into the Government Treasury, and shall furnish to the Examiners the receipt for the said fee of Rs. 20.

23. Any person who shall have passed for the lower grade under the preceding Rules, and who shall desire to be admitted,

shall pay into the Government Treasury of the District in which he shall intend to practise Rs. 15, and shall, on presentation of the Examiners' certificate and of the receipt for the said sum of Rs. 15, be entitled to apply to the High Court for admission and enrolment.

24. The application, together with certificate and receipt mentioned in Rule 23, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by him to the Registrar of the High Court, with any remarks which he may think fit to make thereon.

25. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court-house of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

26. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

27. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant, in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

Rules for Mookhtars.

28. Every person may be admitted as a mookhtar who shall be qualified as hereinafter prescribed, that is to say—

(1) If he shall be qualified to be admitted as a pleader of either grade: provided that his application to be admitted as a mookhtar shall be made within one year from the time of his obtaining such degree or license, or within such further time as the Court shall for any special reason allow; or

(2) If he shall produce a certificate from the Examiners that he has passed an examination in the subjects prescribed from time to time by the High Court for the examination of

1874. mookhtars. Such subject shall until further notice be as
 RULES. follows:—

Code of Civil Procedure.
 Law of Limitation.
 Stamp Laws.
 Small Cause Court Act.
 Penal Code.
 Code of Criminal Procedure.
 Registration Act.
 Evidence Act.
 Contract Act.

29. In order to qualify a person to present himself for the examination required by these Rules for mookhtars—

(1) He must hold a certificate of having passed the entrance examination of the University of Calcutta, Madras, or Bombay, or a certificate of having passed the vernacular or minor scholarship examination, or some other public examination certified by the Director of Public Instruction, or by an Inspector of Schools to be equivalent thereto.

(2) He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

30. Every candidate for examination as a mookhtar shall, on or before the 1st of December of each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to their satisfaction that he possesses all the qualifications declared by Rule 29 to be necessary for such candidates.

31. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a register, with a certificate to the effect that they have been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said register.

32. Before the date of examination every candidate shall pay a fee of Rs. 15 into the Government Treasury of the District, and shall furnish to the Examiners the receipt for the said fee of Rs. 15. :

33. Any person who shall pass the examination as a mookhtar, and who shall desire to be admitted, shall pay into the Government Treasury of the District in which he shall intend to practise Rs. 10, and shall, on presentation of the certificate of the Examiners, and of the receipt for the said sum of Rs. 10, be entitled to apply to the High Court for admission and enrolment.

34. The application, together with the certificate and the receipt required by Rule 33, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

35. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court-house of the Judge to whom the application is sent, and also in the High Court at least three weeks before the applicant is admitted to practise.

36. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

37. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant, in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX of 1865, shall grant him a certificate as required by the said Act.

38. If any person having passed the examination entitling him to be admitted and enrolled as a mookhtar shall fail to apply for such admission and enrolment for a period of one year, he shall not be admitted and enrolled, unless by special order of the High Court the time for such application shall be extended.

39. If any person having been admitted and enrolled as a pleader or mookhtar shall neglect to take out a certificate, or

1874
RULES, having obtained a certificate, shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate, or to have his certificate renewed without further orders of the High Court.

40. Any person who, having been admitted as pleader or mookhtar, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court, who may thereupon suspend such pleader or mookhtar from practice, or pass such orders as the said Court may think fit.

41. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a pleader or mookhtar shall state the fact in his application for admission, and the High Court may refuse to admit such person, or pass such orders thereon as it thinks proper.

42. Any wilful violation of any of the above Rules shall subject a pleader or mookhtar to suspension or dismissal.

43. These Rules shall come into force on the 1st day of January 1874, except so far as they relate to the qualifications required by Clause 1 of Rules 8, 19, and 20, respectively, as to which the Rules now in force shall continue until the 1st of January 1875.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
DWARKANATH MITTER.
O. PONTIFEX.
E. G. BIRCH.
G. G. MORRIS.

11th September 1873.

CIRCULAR ORDER No. 9.

1873

CIRCULAR
ORDERS.*Dated Calcutta, the 15th July 1873.*

AT the instance of the Government of Bengal, the High Court directs that all Sessions

HIGH COURT, &c.,
CRIMINAL SIDE.

Present :

The Hon. Sir R. Couch, *Kt.*, *Chief Justice.*

The Hon. Louis S. Jackson,

" F. A. Glover,

" E. G. Birch, *Judges.*

Judges and Magistrates, when passing sentences, after their rearrest, on prisoners who have escaped, will carefully comply with the provisions of Section 316 of the Code of Criminal Procedure, and specify

in the warrant the date from which sentence is to take effect, whether at once, or after a lapse of a period equivalent to the portion of the prisoner's original sentence which remained unexpired at the time of his escape; the date on which the original sentence, of which the currency was interrupted by the escape, will expire being clearly shown.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR MEMO. No. 7.

Dated Calcutta, the 30th July 1873.

HIGH COURT.
ENGLISH DEPARTMENT.
Criminal.

THE correspondence reproduced below is forwarded for the information and guidance of Sessions Judges and Magistrates.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Extract, paragraphs 1, 2, and 3, from a letter from the Officiating Additional Sessions Judge of _____, No. 162, dated 10th July 1873.

(1.) In all criminal cases which come before me from Native Deputy Magistrates, I find that, while all the witnesses' depositions are written by the Deputy Magistrates with their own hands, directly the confession of a prisoner has to be recorded, the

1878.

CIRCULAR
ORDERS.

Magistrate allows a Mohurrir to write it, and contents himself with making English notes of the substance of the confession, though it is needless to remark that the importance of having an accurate record of the statement made is far the greater with respect to confessions.

(2.) I wrote six months ago to the Magistrate of _____ on the subject of a letter, a copy of which I enclose; but I do not find that any attention is paid to it, and the matter has just been prominently brought to my notice at the recent Sessions at _____, when a Deputy Magistrate admitted before me, when I examined him about a confession recorded in his presence, that he allowed the Police Officer, who had brought in the man, to be present while the confession was recorded by a Mohurrir, and to suggest questions to be put to the confessing prisoner.

(3.) I asked the Deputy Magistrate why he had not written the confession himself. He said that the law did not make it compulsory on him to do so.

From W. M. SOUTTAR, ESQ., Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Additional Sessions Judge of _____, No. 1047, dated Calcutta, the 30th July 1873.

I am directed to acknowledge the receipt of your letter No. 162, dated 10th instant, in which you suggest the issue of instructions with a view to secure the recording of confessions by Magistrates with their own hands.

2. I am to observe in reply that the Court are unable to take away by order a discretion which the law (Section 346, Criminal Procedure Code) allows a Magistrate; for this matter does not come within Section 335. But they agree with you that it is not proper to allow the Police Officer, who brought the prisoner, to be present while the confession is being recorded by a Mohurrir, and to suggest questions to be put to the confessing prisoner. The Court would not be much inclined to attach weight to a confession obtained under such circumstances, though the confession might be admissible; but the course taken suggests that the Deputy Magistrate was not really conducting the inquiry himself.

CIRCULAR ORDER No. 17.

1873

CIRCULAR
ORDERS.*Dated Calcutta, the 2nd August 1873.*

A QUESTION having been raised as to whether there should be any refund, and, if so, how it should be effected, of the value of Court fee stamps filed on account of processes which are not eventually issued, and of postage labels put in on account of letters which have not been despatched, the High Court is pleased to prescribe, for general adoption by all Civil Authorities subject to it, the course indicated below as obviating the necessity for any refund at all.

HIGH COURT,
ENGLISH DEPARTMENT.
Civil.

2. As regards stamps furnished by parties for processes, the Court directs that when the stamps are put in, as they ought to be, with an application for process, the process shall be prepared and the stamp affixed to it and immediately punched, leaving the party to issue it or not as he thinks fit. Postage labels ought not to be received unless and until the party desires that the process should be actually transmitted by post, and in that case the process shall be so transmitted.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 18.

Dated Calcutta, the 4th August 1873.

HIS HONOR the Lieutenant-Governor having approved of the Registrar of the High Court being relieved of the duty of checking contingent bills of Small Cause Courts, and of the audit for these, as it is for all other Courts of inferior rank, being intrusted to District Judges, the Court is pleased to direct that all bills for travelling allowance, stationery charges, and other contingent expenditure incurred by the Courts of Small Causes in a District, be submitted in future to the Judge of that District, instead of, as heretofore, to the High Court.

HIGH COURT,
ENGLISH DEPARTMENT.
Civil.

Registrar of the High Court being
relieved of the duty of checking
contingent bills of Small Cause

Courts, and of the audit for these, as it is for all other Courts of inferior rank, being intrusted to District Judges, the Court is pleased to direct that all bills for travelling allowance, stationery charges, and other contingent expenditure incurred by the Courts of Small Causes in a District, be submitted in future to the Judge of that District, instead of, as heretofore, to the High Court.

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CIRCULAR
ORDERS.

2: At the desire of the Lieutenant-Governor, the Court will, however, continue to retain, for the present, the control of the general expenditure on account of contingent charges of Small Cause Courts, and it is accordingly directed that Small Cause Court Judges apply, *before the beginning of each official year*, for general sanction to the scale of contingent expenditure estimated for, with a view to the preparation of the Budget for the year. The scale in question must be submitted for the approval of the Court, in time for check and control being exercised upon it before it is included in the Budget.

3. A copy of the scale in each case, after it has received the sanction of the Financial Department in the Budget, will be forwarded by the Accountant-General for the information and guidance of the District Judge within whose District the Small Cause Courts to which it relates are situated.

4. The present instructions supersede, as far as Small Cause Courts are concerned, the orders contained in the Circular Orders specified on the margin, to which, nevertheless, the attention of District Judges is drawn as giving information regarding the system under which the Court has heretofore audited the contingent bills in question, which it will henceforward be their duty to countersign and pass.

No. 11, dated 23rd March 1863.
" 8, " 13th May 1865.
" 16, " 28th " 1867.
" 8, " 26th March 1868.

Courts are concerned, the orders contained in the Circular Orders specified on the margin, to which, nevertheless, the attention of Dis-

trict Judges is drawn as giving information regarding the system under which the Court has heretofore audited the contingent bills in question, which it will henceforward be their duty to countersign and pass.

By order of the High Court,
(Sd.) W. M. SOUTTAR,
Registrar.

CIRCULAR ORDER No. 19.

Dated Calcutta, the 6th August 1873.

THE Circulars noted in the margin are hereby rescinded, and

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

No. 26, dated 5th September 1871.
" 18 " 16th May 1872.

the following rules (which have received the sanction of His Excellency the Viceroy and Governor-General in Council,* as provided by 24 and 25 Vic., cap. 104, section 15) concerning the levy of fees on the sale of moveable and immoveable property in

* G. O. (Home Department), No. 1812, dated 24th July 1873.

execution of decrees in the Civil Courts subordinate to the High Court, are hereby promulgated and are to be strictly observed;—

1873
CIRCULAR
ORDERS.

I. There shall be levied in every case of a sale in execution an *ad valorem* fee at the rates undermentioned, the amount whereof shall be credited to Government, whether the sale be conducted by the Court itself or by an Officer of the Court, or by any public Officer under its orders.

Nature of Case.

Rate of Fee.

When the price does not exceed Rs. 1,000 ...	{ One rupee on every hundred or part of a hundred.
When the price exceeds Rs. 1,000, but does not exceed Rs. 10,000 ...	{ On Rs. 1,000 as above, and on the surplus up to Rs. 10,000, one-half rupee on every hundred or part of a hundred.
When the price exceeds Rs. 10,000 ..	{ On Rs. 10,000 as above, and on the surplus one-quarter per cent.

Provided that the amount of fee shall never be less than Rs. 5 upon immoveable property.

II. Such minimum fee of Rs. 5 shall in every case be deposited by the party applying for execution before the proclamation of sale of immoveable property, under section 249 of the Code of Civil Procedure, shall issue, and such fee shall be recoverable, in the discretion of the Court, as part of the costs of execution.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 20.

Dated Calcutta, the 14th August 1873.

THE Court is pleased to prescribe, for general adoption by all

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

Civil Courts; the annexed form of a diary intended to show the attendance of witnesses.

2. The witness on reporting himself to the Nazir or other Officer of the Court is to be entered forthwith in this book; the columns of which are all to be duly and regularly filled up, and the book is to be signed daily by the Judge, Subordinate Judge or Moonsiff, presiding in the Court.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 21.

1878

CIRCULAR
ORDERS.*Dated Calcutta, the 18th August 1873.*

IN order to the better arrangement of business and the obtaining of better sales when property is sold by Civil Courts in execution of decree, the Court is pleased to direct that every District Judge shall appoint a certain fixed day in each month on which, at an hour to be named, all sales of immoveable property in execution of decrees in his own Court and in the inferior Courts at the Sudder Station shall be held. No sale of immoveable property shall take place except on such fixed date or on the next open day (to which any sale not completed on the said fixed date may be adjourned). The notification of sale prescribed by section 249, Code of Civil Procedure, shall be worded in accordance herewith, and the District Judge shall cause to be published in all Courts at the Sudder Station and at the Collector's office, not less than 14 days before the date of sale, a list of such property to be sold.

2. The sale shall commence at the hour appointed, and in some suitable part of the Court-house, and the lots shall be sold strictly according to such list *by the Nazir of the District Court*. The sales are to be conducted in a business-like way *without undue haste*, but not to be unduly protracted.

3. The Judge shall also fix, on the report of the Moonsiffs who are not stationed at head-quarters, a certain day or days for the sale of immoveable property, under similar conditions, at the Court of each Moonsiff, and the sales shall take place in each Court as above directed *mutatis mutandis*.

4. When the sale day in any case falls on a Sunday or other close holiday, the sale shall take place on the first open day thereafter.

By order of the High Court,

(Sd.) W..M. SOUTTAR,

Registrar.

1873

CIRCULAR
ORDERS.

CIRCULAR MEMO. No. 8.

Dated Calcutta, the 19th August 1873.

THE High Court deems it necessary to warn Sessions Judges
and Magistrates to take care that

HIGH COURT.
ENGLISH DEPARTMENT.
Criminal.

parties holding certificates as
Revenue Agents do not practise as

Mookhtars without renewing their certificates in that capacity.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 10.

Dated Calcutta, the 27th August 1873.

IN continuation of Circular Order No. 5, dated 11th March
last, the Court is pleased, with the

HIGH COURT.
ENGLISH DEPARTMENT.
Criminal.

concurrence of His Honor the
Lieutenant-Governor, to direct that

warrants of imprisonment directed to Superintendents of District
Jails shall be in the English language, and that warrants directed
to the keepers of subdivisional lock-ups shall issue in the
vernacular, except where the sentence is for imprisonment of a
longer term than 15 days, in which case the warrants issued by
subdivisional authorities shall, if possible, be in English.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 22.

Dated Calcutta, the 23rd August 1873.

IN continuation of Circular Order No. 10, dated 31st May
last, the Court is pleased to pre-

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

scribe, for general adoption in all
the Civil Courts, subject to its

control, the accompanying form for commissions issuing, under
Section 175, Act VIII of 1859, for the examination of witnesses.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

COMMISSION TO EXAMINE WITNESSES.

• 1878

CIRCULAR
ORDERS.

IN THE COURT OF THE JUDGE

OF DISTRICT

ORIGINAL SUIT (or APPEAL) No.

OF 187 .

*Plaintiff,**versus**Defendant.*

To

COMMISSIONER ON BEHALF OF THE

(PLAINTIFF OR DEFENDANT.)

WHEREAS it is necessary to examine the person (*or persons*) named in the margin as a witness (*or witnesses*) on behalf of (the plaintiff or defendant) in the abovementioned case,—You are hereby appointed Commissioner with full power and authority to examine the said witness (*or witnesses*) upon the interrogatories hereunto annexed: And you are further empowered and commanded, that you do, at certain days and places to be appointed by you for that purpose, cause the said witness (*or witnesses*) to come before you, and then and there examine him (*or each of them*) upon the said interrogatories, either on his (*or their* respective) oath (*or oaths*) or affirmation (*or affirmations*) secondly specified in the schedule hereunto annexed, to be first taken before you in such solemn manner as is or may be authorized by law: And that you do take such examination (*or examinations*) and reduce the same into writing; and when you shall have so taken and reduced the same into writing as aforesaid, you are to send the same to this Court, within days from the date hereof, closed up under your hand and seal, distinctly and plainly set, together with the said interrogatories and this writ: And you are further commanded, that before you act in the swearing or examining the said witness (*or witnesses*), you do take the oath or affirmation first specified in the schedule hereunto annexed.

Dated this day of in the year
one thousand eight hundred and seventy-

(Seal of the Court.)

: District Judge.

4—B

1878.

CIRCULAR
ORDERS.*I.—The Commissioner's Oath.*

I swear that I will, according to the best of my skill and knowledge, truly, faithfully, and without partiality to any of the parties in this case, take the examinations and depositions of such witness (or witnesses) as may be produced before me.

So help me God.

The Commissioner's Affirmation.

I solemnly declare that I will, according to the best of my skill and knowledge, truly, faithfully, and without partiality to any of the parties in this case, take the examinations and depositions of such witness (or witnesses) as may be produced before me.

II.—The Witnesses' Oath.

I swear that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false.

So help me God.

The Witnesses' Affirmation.

I solemnly declare that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false.

NOTE.—Christians to whom the oath is administered, will be sworn upon the New Testament.

To others the oath will be administered upon such symbol, or accompanied by such act, as may be usual, or as the persons taking the oath may acknowledge to be binding on their conscience.

CIRCULAR ORDER No. 11.

Dated Calcutta, the 10th September 1873.

THE orders noted on the margin are hereby rescinded, and the

HIGH COURT, &C.,
ENGLISH DEPARTMENT,
Criminal.

C. O. No. 31, dated 4th November
1870, paras. 7 to 9.

Quarterly Statements D and E will henceforth be submitted by the Sessions Judges to the High Court in the revised form now circulated, commencing with those for the 3rd Quarter of 1873.

2. Statements received in other than the printed forms supplied by the Superintendent of Stationery will be returned, and the district will be dealt with as if no Statements had been received.

1878
CIRCULAR
ORDERS.

3. The Statements will continue to be sent in duplicate as required by Circular Memo. No. 4, dated 7th June last.

4. Column 1 of Statement D will comprise the names of all Officers exercising criminal authority in the district, the letters "C. S." being inserted after the names of Covenanted Officers. Magistrates, other than the Magistrate of the District, will be designated according to their powers as Magistrates of the 1st class, of the 2nd class or of the 3rd class; and not as Joint Magistrates, Assistant Magistrates, or Deputy Magistrates.*

5. The Benches of Magistrates which have sat in the Quarter under report will also be entered here, and the names of the Magistrates who have served on them will be shown in the column of Remarks instead of on the back of the Statement, as required by Circular Memo. No. 3, dated 26th May last.

6. Columns 3, 4 and 5 will be filled up according to the instructions contained in Circular Order No. 7, dated 10th April last, to which it may be added that column 5, "acquitted," will show all dismissals (as under section 205) and discharges (as under section 496) which operate as acquittals. New trials ordered under section 328 will appear in column 8. The persons shown as "remaining under trial" at the close of one Quarter should be included (though not separately exhibited) in column 3 of the return for the following Quarter, as "persons under trial." Cases decided by Municipal Commissioners should not be entered in this Statement.

7. This Statement is intended to comprise all appeals preferred either to the Sessions Judge, or to the Magistrate, without detail of the Officers from whom the appeals may be preferred; and also references made to the High Court under

* *e. g.*, Magistrate of the District; A. Jones, Esq., C. S., 1st class; B. Williams, Esq., 1st class; Baboo M. N. Dass, 1st class; C. Howell, Esq., C. S., 2nd class; M. Anwar Ali, 2nd class; &c., &c.

1878

CIRCULAR
ORDERS.

section 296, Act X of 1873, either by the Sessions Judge or by the Magistrate. Persons whose cases are shown as "pending" in column 10 should be included in the number entered in column 2 of the ensuing Quarter's returns.

8. After the Magistrate has prepared and signed Part I of Statement D, and filled up his portion of Statement E, the Statements will be submitted to the Sessions Judge, who will enter, in Part II, Statement D, the result of trials disposed of by him; and, in Statement E, the result of appeals preferred before his Court. He will then forward the completed return to the High Court.

9. Both Magistrates and Judges are called upon to see that the Statements are prepared *neatly*, as well as correctly, in respect of the entries made, and that they are not disfigured by slovenly or bad writing. On such cases occurring the Statements will be liable to be returned.

10. The column of Remarks, which in each Statement is of ample size, will contain the mention of any cases or particulars which do not appear to be fairly provided for in other columns, and will also contain brief explanations of any noticeable results appearing on the face of the returns, specially of such as if unexplained might lead to erroneous conclusions: in short, any comments that will tend to throw light on the figures.

11. This return will not interfere with the submission of the Statement No. III prescribed by Circular Order No. 10, dated 12th July 1870.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 23.

Dated Calcutta, the 11th September 1873.

THE Court is pleased to direct, with reference to applications

HIGH COURT,
ENGLISH DEPARTMENT,
Civil.

for enrolment as Pleaders or Mook-tars made by persons who have passed the examination contem-

plated by the Rules drawn up under Section 4, Act XX of 1865, that where the application is made in a district different

from that in which the examination was passed, it must be accompanied by a letter from the Judge of the District in which the applicant passed, or in which he received permission to appear at the examination, certifying that such person has stated his desire to practise in the district named, and setting forth the reasons, together with a statement of the certifying Judge's belief that the application is *bonâ fide*.

•1873

CIRCULAR
ORDERS.

2. Such letter shall be granted upon a petition presented in open Court, and notice of such petition shall be first stuck up in a conspicuous part of the Court-house for 14 days.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR MEMO. No. 15.

Dated Calcutta, the 12th September 1873.

THE attention of District Judges, Subordinate Judges, and Judges of Small Cause Courts is called to the rules, which direct that applications for leave on the part of such officers should be submitted, through the High Court, to the Government.

HIGH COURT,
ENGLISH DEPARTMENT,
Civil.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR MEMO. No. 16.

Dated Fort William, the 16th September 1873.

HIGH COURT,
ENGLISH DEPARTMENT,
Civil.

Copy of the following letter is forwarded to the Judge of

with a

Present :
The Hon'ble Louis S. Jackson,
Judge.

request that he will attend to its instructions.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

1878

CIRCULAR
ORDERS.

FROM

No. $\frac{S}{292}$

THE ACCOUNTANT-GENERAL, BENGAL,

To

THE REGISTRAR, HIGH COURT.

Dated the 8th September 1873.

SIR,—I would be much obliged by your issuing an instruction to Judges to report to this office every case of appointment by them of an Officiating Moonsiff. Much inconvenience is caused by the necessity of my having to make enquiries in every case where a new name appears.

2.. The report should contain the name of the officer appointed, whether he is a Government servant, the office to which he is appointed, and the occasion of the appointment. The date of joining should also be communicated either with the first report (which will be a good enough time if it is kept back till the officer joins), or in a subsequent separate Report.

I have, &c.,

(Sd.) J. WESTLAND,

Officiating Accountant-General, Bengal.

CIRCULAR MEMO. No. 17.

Dated Calcutta, the 4th November 1873.

THE following Notification by the Government of India,

HIGH COURT, &c.,
ENGLISH DEPARTMENT,
*Civil.*Home Department, dated the 17th
October last, is circulated for the
information and guidance of allJudicial Officers, and the Court enjoins the strictest compliance
with the instructions therein laid down.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

No. 3204.

HOME DEPARTMENT.

1878

CIRCULAR
ORDERS.

Public.

Dated Simla, the 17th October 1873.

NOTIFICATION.—As there is reason to believe that the orders of this Department, dated the 15th June 1869, warning public officers to be careful in granting certificates to their subordinates, are not generally known or acted upon, those orders are here below republished for general information; and all officers of Government are required carefully to observe them:—

Circular to Local Governments and Administrations, dated the 15th June 1869.

“The Governor-General in Council has recently had under consideration a case in which a public officer, the Head of a Department, in granting a certificate to one of his subordinates, suppressed the true reason for which the subordinate had been removed from his appointment. Such an omission may obviously be injurious to the interests of the public service, I am therefore directed to draw attention to the subject, and to request the issue of orders to all public officers, warning them to be careful in giving certificates to their subordinates, to state the whole truth in respect of character and cause of dismissal or resignation of appointment.”

A. C. LYALL,

Secretary to the Government of India.

CIRCULAR MEMO. No. 18.

Dated Calcutta, the 10th November 1873.

ALL District Judges and Judicial Commissioners are hereby

HIGH COURT.
ENGLISH DEPARTMENT,
Civil.

requested to obtain from their own offices, as well as from the Courts subject to their control, the particulars set forth in the annexed form regarding compulsory sales of immoveable property not conducted by the agency of the

1873
CIRCULAR
ORDERS.

Collector, and submit the same to the High Court for the information of Government. The return in question should embrace the official year 1872-73, and should be similarly submitted in future years.

2. By the words "Great Zemindaris," in the first column of the form, are intended *zemindaris paying more than Rs. 50,000 revenue*: and by "Large Zemindaris," *those paying more than Rs. 5,000 revenue*.

By order of the High Court,

(Sd.) J. H. BELCHAMBERS,

Deputy Registrar,
for Registrar.

Register of Transfers by compulsory Sale.

Nature of Tenure transferred.	Number of Transfers recorded.	Average Area in Acres of each Holding transferred.	REMARKS.
Great zemindaris, complete ...			
Shares in zemindaris, complete			
Large zemindaris			
Shares in ditto			
Small zemindaris			
Shares in ditto			
Villages owned by cultivating communities			
Shares in ditto			
Holdings of proprietary cultivators			
Intermediate holdings of a transferable character ...			
Holdings of ryots at fixed rates.			
Holdings of ryots with right of occupancy			
Revenue-free tenures			

CIRCULAR ORDER No. 22.

1873

CIRCULAR
ORDERS.*Dated Calcutta, the 25th November 1873:*

IN supersession of such portion of Circular Order No. 32,

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

6 and 6A Statement showing
the average duration of suits and
appeals.

dated 8th November 1870, as declares the Statements named on the margin to be no longer necessary, the Court is pleased to direct the preparation of those Statements for the year 1873, and for future years, in accordance with the instructions contained in Circular Order No. 6, dated 9th March 1870, which should be carefully observed.

2. Those instructions should also guide the local Courts in filling up columns 19 and 20 of Judicial Statement No. 8 (Circular Order No. 32, dated 8th November 1870), which provide for the exhibition of the average duration of suits contested and uncontested.

3. The Court desire also that, in calculating the duration of cases, whether original suits or appeals, the reckoning be made from the date of institution, and not from that of transfer.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

CIRCULAR ORDER No. 12.

Dated Calcutta, the 28th November 1873.

IN continuation of Circular Order No. 10, dated 27th August

HIGH COURT.
ENGLISH DEPARTMENT.
Criminal.

1873, the Court is pleased, at the request of His Honor the Lieutenant-Governor, under instructions from the Government of India, to direct that in all cases where the accused is a soldier or person holding any rank in the army, the warrant for detention or imprisonment shall set forth accurately the rank of the prisoner and the Regiment or Military Department to which he belongs.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

1873.

CIRCULAR
ORDERS.

CIRCULAR MEMO. No. 19.

Dated Calcutta, the 29th November 1873.

THE attention of District Judges is again called to the necessity of showing in their Quarterly Returns the number of days they devoted to civil work during the period embraced by those Returns, the Court having observed that the requirements of Circular Memorandum No. 3, dated 28th February last, have been very frequently overlooked.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Registrar.

Circular No. 84.

RESOLUTION by the Government of India, Financial Department, No. 2997, dated Fort William, the 14th November 1873..

In consequence of the failure of the autumn rice crop throughout a large part of the territories administered by the Lieutenant-Governor of Bengal, there is reason to fear that there may be a large expenditure of money for the relief of distress, and a serious loss of revenue.

2. The Viceroy and Governor-General accordingly deems it necessary to invite the attention of Local Governments and Chiefs of Departments to the imperative necessity that is laid upon the Government and its officers for the immediate curtailment of all expenditure that can be reduced, postponed, or dispensed with. The scarcity in Bengal may cause a considerable strain on the general resources of the State, and expenditure that would be proper under ordinary circumstances would be out of place now.

3. His Excellency desires that each officer will take immediate steps to stop any expenditure in the present year that can be prevented, and that all estimates of charge for the coming year, 1874-75, may be reconsidered and reduced to the utmost possible extent.

4. No increase of expense should for the present be suggested that can by any means be avoided.

5. The Viceroy and Governor-General is confident that officers of the Government will recognize the necessity for these instructions, and he looks for their loyal co-operation in giving effect to them.

• 1878

CIRCULAR
ORDERS.

RESOLUTION (Statistical Department) of the Government of Bengal, dated Calcutta, the 21st November 1873.

READ—

A Resolution of the Government of India in the Financial Department, No. 2997, dated the 14th November 1873, inviting the attention of this Government to the imperative necessity of immediate curtailment of all expenditure that can be reduced, in consequence of the large expenditure of money and loss of revenue which may arise from the threatened failure of crops in Bengal.

In circulating these orders to all Heads of Departments and to Commissioners of Divisions, the Lieutenant-Governor hopes that every possible endeavour will be made by Heads of Departments to curtail expenditure as far as possible. At the same time His Honor desires that the following projects and undertakings may be postponed:—

- (1) Experimental projects in the Opium Department.
- (2) Chittagong Settlement Undertaking.
- (3) Orissa Field Survey.
- (4) Avoidable expenditure in jails.
- (5) Nepaul Boundary Verification for the present year.
- (6) The Field Survey in Behar, if the Irrigation Department see no objection.

2. With regard to the first project, the Lieutenant-Governor will be glad if the Member in charge would issue orders after consulting the Agents as to the experimental schemes which can be foregone without jeopardizing the revenue.

1878.

CIRCULAR
ORDERS.

CIRCULAR MEMO. No. 20.

Dated Calcutta, the 4th December 1873.

COPY of the foregoing Circular No. 84 of the Government of Bengal, with the Resolution of the Government of India referred to therein, is circulated for the information and guidance of all Civil Courts under the control of the High Court.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

By order of the High Court,

(Sd.) J. H. BELCHAMBERS,
*Deputy Registrar, in charge
of the office of Registrar.*

CIRCULAR ORDER No. 25.

Dated Calcutta, the 30th December 1873.

HAVING reason to believe that some misapprehension exists as to the orders noted on the margin, in connexion with the tripartite division of the headings of the Quarterly Statements A and B, and that of the Annual Statement No. 6, the Court is pleased to issue the following instructions on the subject.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

Circular Order No. 31, dated 4th November 1870, paragraphs 4 and 5.
Circular Order No. 32, dated 8th November 1870, paragraph 7.

2. In the Quarterly Statements submitted to the Court, as well as in the Annual Statement No. 6 (Civil), or "Statement showing the number and description of civil suits instituted in the Civil Courts of the district," &c., the headings "Small Cause Court Class" and "Suits for money, distinguishing suits up to Rs. 500 cognizable by Small Cause Courts from other cases," shall be taken to embrace all suits for money, comprehended within the sub-headings of that denomination in the Statement No. 6, whether, with reference to value or other limitations, cognizable by a Court of Small Causes or not; so that in this respect the Annual and Quarterly Statements may correspond.

3. The provisions of Circular Order No. 176 of the late Sudder Court, dated 10th April 1861, are, in other respects, to remain in force, and the explanations heretofore required in respect of particular classes of suits will continue to be submitted.

4. Again, in the Quarterly as well as in the Annual Statements, the description "Rent suits" or "Rent cases" will include all suits under the Rent Law, Act VIII (B.C.) of 1869, which are arranged under the sub-headings specified in the prescribed form for that Statement; but the instructions in regard to the speedy trial of suits, and the explanations in respect of cases pending over six weeks, relate only to suits for rent due and owing.

5. The heading "other suits" will thus comprise the same denominations in the Annual No. 6, and in the Quarterly Statements.

By order of the High Court,

(Sd). H. J. S. COTTON,
Offg. Registrar.

No. 3037.

HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL

The 13th December 1873.

RESOLUTION.

THE question having been raised whether practising pleaders of the Courts of the interior shall be eligible to the appointment of Sub-Registrar of Deeds, the High Court are pleased to declare that pleaders of both the higher and lower grades, admitted and enrolled under Act XX of 1865, shall be allowed to hold the office of Sub-Registrar of Deeds without prejudice to their practice.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

CIRCULAR MEMO. No. 21.

Ordered that a copy of this Resolution be forwarded to all District Judges, with a request that they will watch and report if any inconvenience appears to result from the office of Sub-Registrar being held by a pleader in active practice.

By order of the High Court,

(Sd). H. J. S. COTTON,
Offg. Registrar.

. 1878

CIRCULAR
ORDERS.

1874
RULES.

RULES AS TO FEES OF THE HIGH COURT (ORIGINAL JURISDICTION) AND OF THE SHERIFF OF CALCUTTA.

It is ordered that the first, second, and third of the Rules of the High Court of Judicature at Fort William in Bengal, in its Original Jurisdiction, which came into effect in July 1862, and the tables of fees of the said High Court, in its Original Civil Jurisdiction (except those which came into effect on the 15th day of May 1873), in its Matrimonial Jurisdiction, in its Original Criminal Jurisdiction, and in all proceedings *in personam*, in its Admiralty or Vice-Admiralty Jurisdiction, and also the table of fees of the Sheriff of Calcutta, be and the same are hereby repealed. And it is further ordered that the following Rules be read and passed as the Rules of the said High Court, in its Original Jurisdiction, to take effect from the ninth day of March 1874 :—

1. The fees of Court to be taken in all proceedings *in rem* and other proceedings in the exercise of Admiralty or Vice-Admiralty Jurisdiction, to which the Rules contained in Act. VIII of 1859 are not applicable, shall be those set forth in the table of fees made and established by order of his late Majesty King William the IV in Council, in pursuance of the 2nd William IV, Cap. 51.

2. The fees of Court to be taken in all proceedings in the respective jurisdictions indicated in the headings to the first, second, third, and fourth Schedules hereto, and to which the tables of fees which came into effect on the 15th of May 1873 are not applicable, shall be those set forth in such Schedules, respectively.

3. The first of the said Schedules shall, except as to fees specially provided in the second and third of the said Schedules, apply to all proceedings, Testamentary and Intestate, and Matrimonial, and shall also apply to all proceedings in appeal from the Original Civil Jurisdiction of the Court.

4. The fourth of the said Schedules shall apply to all proceedings in appeal from the Original Criminal Jurisdiction of the Court, as well as to all other proceedings in such jurisdiction.

5. The fees to be allowed to the Sheriff and his officers shall be those set forth in the fifth Schedule hereto.

6. The fees to be allowed to arbitrators and others named in the sixth Schedule hereto shall be those set forth in such Schedule. 1874
RULES.

7. The allowance to be made to witnesses shall be those set forth in the seventh Schedule hereto.

8. The folio for all purposes shall consist of 90 words, and 7 figures shall be counted as one word.

(Sd.) R. COUCH.
F. B. KEMP.
L. S. JACKSON.
A. G. MACPHERSON.
F. A. GLOVER.
W. AINSLIE.
C. PONTIFEX.
E. G. BIRCH.
G. G. MORRIS.

Filed 15th March 1874.

THE FIRST SCHEDULE.

ORIGINAL CIVIL JURISDICTION.

Admiralty and Vice-Admiralty Jurisdiction (limited to Proceedings in Personam).

	Rs.	As.	P.
1. Order for admission of Barrister or Attorney ...	10	0	0
2. On presentation of plaint, or of case stated under Section 328 of Act VIII of 1859 ...	10	0	0
3. Petition to sue in <i>forma pauperis</i> ...	0	8	0
4. Summons to defendant, each ...	2	0	0
5. Authority to sue or defend ...	8	0	0
6. Filing every document for which a fee is not specially provided, including documents annexed as exhibits to affidavits or affirmations, or produced with plaint or used in evidence ...	2	0	0

Note.—Not to be charged twice in the same suit. Vouchers to be treated as forming one document with the bill or account to which they relate.

Entries in a book to be treated as forming one document with the book.

7. For comparing copies of documents with the originals under Section 39 of Act VIII of 1859, for each of the first five documents ...	1	0	0
For every other document ...	0	8	0

1874 .

Rs. As. P.

RULES.

- | | | | |
|---|---|---|---|
| 8. Every application to the Court or a Judge either before or after decree | 5 | 0 | 0 |
| 9. Every order thereon issued from the Registrar's office | 5 | 0 | 0 |
| 10. Every warrant of arrest or attachment, and every writ or process in execution of or to enforce a decree or order | 5 | 0 | 0 |
| 11. Every report or certificate of a Judge or an officer of the Court made after a single meeting ... | 5 | 0 | 0 |
| For every meeting after the first | 2 | 8 | 0 |
| 12. Every certificate to accompany exemplification of any document or proceedings to be transmitted to England | 5 | 0 | 0 |
| 13. Every other certificate for which a fee is not specially provided | 2 | 0 | 0 |
| 14. Commission to examine witnesses, or other special Commission | 6 | 0 | 0 |
| 15. For production by any officer of the Court at the hearing of a suit of the records of any other suit | 3 | 0 | 0 |

Note.—When this fee is charged, no fee for searching is to be charged.

- | | | | |
|---|---|---|---|
| 16. For every attendance on parties or their Attorney inspecting books or papers deposited in Court for inspection | 3 | 0 | 0 |
| 17. For enquiring into the sufficiency of security for every hour or part of an hour | 2 | 8 | 0 |

Note.—Not to be charged to officers of Court who have to give security for the due performance of their duties, or to administrators.

- | | | | |
|---|---|---|---|
| 18. For every search or examination of records when no certificate or office copy is taken | 2 | 0 | 0 |
|---|---|---|---|

Note.—This fee is not to be charged to a witness (not a party to the suit) applying for the return of documents produced by him.

- | | | | |
|---|---|---|---|
| 19. Every oath or affirmation administered to a witness | 2 | 0 | 0 |
|---|---|---|---|

Note.—The party producing the witness or his Attorney shall cause a stamp of this value to be affixed on the deposition within 48 hours after the termination of the trial.

This fee is not to be charged if the witness be examined *de bene esse* under commission.

	Rs.	As.	P.	1874
20. For reducing into writing the depositions of witnesses,				RULES.
for each folio	0	8	0	

Note.—It shall be the duty of the party whose witness is examined, or his Attorney, to affix the proper stamp on the deposition within 48 hours after the termination of the trial.

21. For every day or part of a day in which the Court is occupied in trying a case (including appeals from the Original Jurisdiction) after the first day ...	20	0	0
22. For every day or part of a day in which the Court is occupied in taking the examination of witnesses under <i>Mandamus</i> or Commission sent to this Court for execution	20	0	0
23. Every final decree where the amount decreed does not exceed Rs. 1,500	8	0	0
Where it exceeds Rs. 1,500, but does not exceed Rs. 2,500	12	0	0
Where it exceeds Rs. 2,500, but does not exceed Rs. 5,000	16	0	0
Where it exceeds Rs. 5,000	20	0	0
In other cases	16	0	0
24. Decree for the defendant where the suit is dismissed ...	5	0	0
25. Decree for the defendant in suits in which a set-off is pleaded and balance awarded in favor of the defendant— <i>ad valorem</i> upon the amount of such balance the same as in decrees for plaintiff.			
26. Filing memorandum of appeal in suits for debt or damages where the amount to which the appeal relates does not exceed Rs. 1,500	16	0	0
Where it exceeds Rs. 1,500, but does not exceed Rs. 2,500	24	0	0
Where it exceeds Rs. 2,500, but does not exceed Rs. 5,000	32	0	0
Where it exceeds Rs. 5,000	50	0	0
In other cases	32	0	0
27. Every decree for plaintiff on appeal in which the decree of the Lower Court was in favor of the defendant— <i>ad valorem</i> upon the amount decreed, as in original suits.			

1874.

Rs. As. P.

RULES.

28. Every decree for plaintiff on appeal where the amount decreed in the Lower Court is increased on appeal—*ad valorem* upon the amount of such increase, as in original suits.
- | | | | |
|-----------------------|----|---|---|
| In other cases | 16 | 0 | 0 |
|-----------------------|----|---|---|
29. Every exemplification of decree or other document, in addition to the folio and other charges ... 10 0 0
30. For copies of any document, per folio ... 0 8 0
31. For amending proceedings under order of Court, per folio ... 0 8 0
32. On every sale conducted by, or made with the approval of, the Registrar—a commission of 10 per cent. on the first thousand, and $2\frac{1}{2}$ per cent. on the rest of the purchase-money.

Note.—The stamp to be affixed on the bidding paper.

- | | | | |
|--|---|---|---|
| 33. For translations, per folio | 2 | 0 | 0 |
|--|---|---|---|

Note.—The fee to be charged on the number of folios contained in the original document.

- | | | | |
|--|----|---|---|
| 34. For every summons by Taxing Officer... | 2 | 0 | 0 |
| 35. Every certificate by Taxing Officer ... | 1 | 0 | 0 |
| 36. For taxation of each bill of costs above Rs. 300 ... | 10 | 0 | 0 |
| For taxation of each bill of costs not exceeding Rs. 300 | 5 | 0 | 0 |
| If the taxation occupies more than an hour, for every additional hour or part of an hour ... | 10 | 0 | 0 |

Accountant-General.

37. Upon all moneys paid into Court with the privity of the Accountant-General—1 per cent., and upon all interest accruing thereon $2\frac{1}{2}$ per cent.
- | | | | |
|--|----|---|---|
| 38. For entering and countersigning decree or order for the payment of money | 5 | 0 | 0 |
| 39. For making and entering every certificate to be annexed to such decree or order | 10 | 0 | 0 |
| 40. For every search where no certificate is required ... | 3 | 0 | 0 |
| 41. For every certificate of funds in Court ... | 5 | 0 | 0 |

Note 1.—No commission is to be charged upon moneys paid into Court by the Official Receiver of the Court.

Note. 2.—No fee, except commission, is to be charged when the amount in Court does not exceed Rs. 400, or in respect of payments made to suiters periodically.

1874
RULES.

THE SECOND SCHEDULE.

Testamentary and Intestate Jurisdiction.

	Rs.	As.	P.
1. For every petition for probate or letters of administration	4	0	0
2. For every citation	2	0	0
3. Inventory	1	0	0
4. Accounts of executors or administrators if not exceeding 3 folios	1	0	0
Every other folio	0	5	0
5. For searching after any will, administration, inventory or account	0	8	0
6. For registering every will not exceeding 5 folios	2	0	0
For every other folio	0	8	0

THE THIRD SCHEDULE.

Matrimonial Jurisdiction.

1. Plaint or memorandum of appeal in a suit to obtain possession of a wife	5	0	0
2. Marriage license	17	0	0

THE FOURTH SCHEDULE.

Original Criminal Jurisdiction.

1. Every writ of <i>Mandamus</i> , <i>Certiorari</i> , <i>Habeas Corpus</i> , <i>Procedendo</i> , or other writ for which a fee is not specially provided	4	0	0
2. Precepts for special and petty jurors	4	0	0
3. Every recognizance and respiting the same, each	3	0	0
4. For each bail	2	0	0
5. For entering appearance of a defendant	2	0	0
6. Every order minuted, but not drawn up	1	0	0

Note.—The stamp to be affixed on a copy of the minute.

7. Every order drawn up and issued	4	0	0
8. For drawing any document or instrument for which fee is not specially provided, per folio	0	8	0

1874.

Rs. As. P.

RULES.

9. For filing every document for which a fee is not specially provided ... 1 0 0
10. For every search or examination of records, when no certificate or copy is taken ... 1 0 0
- Note.*—The stamp to be affixed on the requisition.
11. For every subpoena to give evidence or produce documents ... 2 0 0
- Note.*—Not to be charged to prisoners applying for subpoena through the Superintendent of the Jail,
12. For production at the hearing of a case of the records in any other case ... 3 0 0
- Note.*—When this fee is charged, no fee for searching is to be charged.
13. Every certificate for which a fee is not specially provided ... 2 0 0
14. For copies of documents for which a fee is not specially provided, per folio ... 0 5 0
15. Every petition of appeal ... 10 0 0
16. Every Judge's certificate to accompany the appeal... 5 0 0

Proceedings commenced by Information.

17. For signing every information ... 8 0 0
18. For subpoena to answer ... 3 0 0
19. For joining issue ... 2 0 0
20. For recording verdict ... 2 0 0
21. For entering confession, acquittal, or discharge ... 4 0 0
22. For drawing record, for the first folio ... 2 0 0
- For every other folio ... 1 0 0

Note.—The fees for all other proceedings on information to be regulated by the other items of this table.

THE FIFTH SCHEDULE.

Fees and Charges to be allowed to the Sheriff.

1. For arresting each person named in a writ when nothing is realized ... 16 0 0
- Otherwise ... 2 0 0

Note.—The latter fee to be allowed, *plus* poundage on sums levied.

2. For executing any attachment against moveable or immoveable property ... 2 0 0

	Rs.	As.	P.	1874
				RULES.
3. For serving each juryman with summons ... (To be charged to the Fine Fund.)	2	0	0	
4. For serving every other summons, for each person served ...	2	0	0	
5. For executing every writ of <i>Habeas Corpus</i> , injunction or other writ for which a fee is not specially provided, each person against whom the writ is directed ...	2	0	0	
6. For executing warrants for apprehension of witnesses, and warrants for security to be furnished by defendant (issued by another Court), for each person	4	0	0	
7. For serving summons, notice, proclamation, subpoenas, &c. (issued by another Court), for each person served ...	2	0	0	
8. For serving citation ...	2	0	0	
9. For every ordinary return ...	1	0	0	
10. For every special return ...	2	0	0	
11. For translations when necessary, per folio ...	0	8	0	
12. For every warrant to discharge defendant from custody ...	2	0	0	
13. For bringing up defendant from jail after remand ...	2	0	0	
14. For every certificate of seizure ...	5	0	0	
15. For every other certificate ...	2	0	0	
16. For drawing every security bond in mofussil cases...	8	0	0	
17. For office copies, per folio ...	0	8	0	
18. For attending Court or before a Judge or other officer of Court with papers ...	3	0	0	
19. For every bond of indemnity for seizing property, &c., when there are adverse claims ...	32	0	0	
20. For every search when no certificate or office copies obtained ...	1	0	0	
21. Poundage on sums levied by the Sheriff in execution for the first Rs. 1,000 at 5 per cent., and for the rest $2\frac{1}{2}$ per cent.				
22. Poundage on a writ of possession upon every Rs. 10 of the yearly value ...	0	8	0	
23. For attending Court during each criminal sessions, per diem ...	16	0	0	
(To be charged to the Fine Fund.)				

1874.

Bailiffs for executing Summons, &c.

RULES.

European. Native.

Rs. As. P. Rs. As. P.

1. For serving summons—									
As to defendants residing in the same house when served personally, or when service effected by delivery of the summons to one person—									
For the first defendant ...	...	4	0	0	1	0	0		
For every other defendant ...	...	2	0	0	0	8	0		
By fixing a copy to the door of the dwelling-house—									
For all the defendants residing in the same house who may be thus served		6	0	0	2	0	0		
2. In other cases for serving each defendant		4	0	0	0	8	0		
3. For serving citations ...	...	2	0	0	1	0	0		
4. For arresting a party ...	...	16	0	0	4	0	0		
5. For bringing him up before the Court when the Sheriff's officer is detained in Court for three hours and upwards		8	0	0	2	0	0		
Otherwise ...	...	4	0	0	1	0	0		
If the party be arrested after the rising of the Court, for bringing him up before the Court on the following day and lodging him in jail after committal		8	0	0	2	0	0		

Note.—This fee is to be reduced to Rs. 4 and Re. 1 if the party on being brought up should be released.

If the party be released upon security to appear on another day, for attending the Court to take him into custody ..		4	0	0	1	0	0		
For lodging him in jail, if committed ...	...	4	0	0	1	0	0		
6. For every affidavit of service of summons		2	0	0	0	8	0		
7. For attaching moveable property ...	...	16	0	0					
8. For attaching or giving possession of immoveable property, for the first parcel ...	...	16	0	0					
For every other parcel ...	...	2	0	0					

THE SIXTH SCHEDULE.

1874
RULES.

Fees to be allowed to Arbitrators, Commissioners of Partition, or
for the examination of witnesses de bene esse,
Clerks and Interpreters.

Arbitrator's or Commissioner's Fees.

G. M.

For every effectual meeting	...	...	5
-----------------------------	-----	-----	---

Clerk's Fees.

For every effectual meeting	...	...	2
-----------------------------	-----	-----	---

Counsel's Fees.

For every single meeting	...	...	...	5
--------------------------	-----	-----	-----	---

„ „ double „	...	...	...	7
--------------	-----	-----	-----	---

Above four hours, a double meeting.

Interpreter's Fees.

For every effectual meeting	...	...	2
-----------------------------	-----	-----	---

Fees to be taken by Interpreters for explaining plaints, written
statements or other documents, except affidavits or affirmations,
at the house of the suitor, or any place other than the Court-
house.

Rs. As. P.

When not exceeding 20 folios	...	...	8	0	0
------------------------------	-----	-----	---	---	---

Exceeding 20 folios	...	...	16	0	0
---------------------	-----	-----	----	---	---

Fees to be allowed to Commissioners and Interpreters for taking
affidavits or affirmations at the house of the suitor, or any place
other than the Court-house.

Commissioner's Fees.

Rs. As. P.

For the first affidavit, oath, or affirmation, if within the limits of Calcutta	...	...	16	0	0
--	-----	-----	----	---	---

If beyond the limits of Calcutta and within five miles	...	...	32	0	0
---	-----	-----	----	---	---

For every affidavit, oath, or affirmation taken at the same time and place after the first	...	...	8	0	0
---	-----	-----	---	---	---

Note.—In no case shall a Commissioner be allowed for taking any number of
affidavits, oaths, or affirmations at the same time, and place more than 5 gold.

1874 mohurs if such place be within the limits of Calcutta, or more than 6 gold
 RULES. mohurs if such place be beyond the said limits and within the distance of
 5 miles.

Interpreters are to be allowed half the fees allowed to the Commissioners.

THE SEVENTH SCHEDULE.
 Allowance to Witnesses per Diem.

	CLASS.			
	First.	Second.	Third.	Fourth.
	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. A. P.
Common witnesses, as common soldiers, common mariners, laborers, carriers, domestic servants, sircars, mohurirs, &c. ...	2 8 0	1 0 0	0 12 0	.....
Tradesmen ...	8 0 0	4 0 0	2 0 0	1 0 0
Merchants ...				
Managers of Banks ...	12 0 0	8 0 0	6 0 0	4 0 0
Zemindars ...				
Gentlemen of property ...				
Auctioneers ...				
Brokers ...	10 0 0	6 0 0	3 0 0	.....
Professional Accountants ...				
Professional men ...	16 0 0	12 0 0	8 0 0	.....
Editors, Engineers, and Surveyors ...	12 0 0	8 0 0	6 0 0	3 0 0
Officers in Civil employ drawing not less than Rs. 500 a month, according to rank ...	12 0 0	8 0 0	6 0 0	.....
Military and Naval Officers, according to rank ...	12 0 0	8 0 0	6 0 0	.....
Shroffs ...				
Banians ...	8 0 0	6 0 0	4 0 0	2 0 0
Schoolmasters ...				
Commanders and Officers of ships				
Articled and other Clerks ...	6 0 0	4 0 0	2 0 0	.....
Police Inspectors ...	4 0 0	3 0 0	2 0 0	.....
Petty Officers, Military or Marine				
Custom House Officers ...	4 0 0	.....	.....	.....
Engine-drivers ...	4 0 0	2 0 0	.....	.....
Godown Sircars ...	5 0 0	2 0 0	1 0 0	.....
Females, according to station ...				

Note.—If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one cause, they will be entitled to a proportionate part in each cause.

Witnesses residing out of Calcutta will be allowed travelling expenses according to the sums reasonably and actually paid, and will also, if detained in Calcutta, be allowed such a sum for subsistence money and carriage hire as the Taxing Officer, having regard to the daily allowance fixed by the scale, shall consider reasonable.

The Taxing Officer will decide to what class the witness belongs.

CIVIL CIRCULAR ORDER No. 1.

*Dated Calcutta, the 14th January 1874.*1874
CIRCULAR
ORDERS.

IN modification of the list of holidays prescribed by Circular Order No. 24 A, dated 29th December 1873, the Court is pleased to direct that the Ras Poornima (one day) be substituted for the Dusshera Gunga Snan in the Civil Courts of Orissa.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

By order of the High Court,
(Sd.) H. J. S. COTTON,
Offg. Registrar.

CRIMINAL CIRCULAR ORDER No. 1.

Dated Calcutta, the 17th January 1874.

THE High Court find it necessary to call the attention of the several Subordinate Criminal Courts, and of the Officers in charge of Jails, to the provisions of Act X of 1872, in respect of the submission of criminal appeals. Section 275 of the present law enacts that "every petition of appeal shall be accompanied by a copy of the judgment or order appealed against." In cases tried by Jury, a copy of the Judge's charge to the Jury will take the place of the judgment or other order, and a copy of the judgment or other order, or of the Judge's charge to the Jury, as the case may be, is, under Section 276 of the Code, to be furnished without delay on the application of any person affected by such sentence or order.

2. What the judgment or final order in the case shall contain is enacted in Section 464 of the Code:—"The judgment or final order shall contain the point or points for determination, the finding thereupon, and the reasons for the finding."

3. No doubt can exist as to the plain requirements of the law in this matter, and the Court desire, accordingly, that the Subordinate Courts will carefully comply with the provisions of the new Code and discontinue the practice, which at present exists in several quarters, of furnishing to the person affected,

1874
CIRCULAR
ORDERS.

and sending up to the Appellate Court, a copy of the sentence only with the petition of appeal.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

CIRCULAR MEMO. No. 1.

Dated Calcutta, the 24th January 1874.

In supersession of Circular Memo. No. 2, dated 26th February 1873, the annexed revised list of headings is circulated for the guidance of all Civil and Criminal

HIGH COURT.
ENGLISH DEPARTMENT.
Civil and Criminal.

Courts subject to the control of the High Court, to be adopted in the preparation of Judicial Statement (annual) B 1 from and after 1st January 1873, when Act X of 1872 came into operation.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

List of Headings.

Magistrates of the third class exercising	CRIMINAL powers only	{ Paid. Unpaid.
Magistrates of the third class exercising	CRIMINAL and CIVIL powers.	
Magistrates of the third class exercising	CRIMINAL and REVENUE powers.	
Magistrates of the third class exercising	CRIMINAL, CIVIL, and REVENUE powers.	
Magistrates of the second class exercising	CRIMINAL powers only.	
Magistrates of the second class exercising	CRIMINAL and CIVIL powers.	
Magistrates of the second class exercising	CRIMINAL and REVENUE powers.	
Magistrates of the second class exercising	CRIMINAL, CIVIL, and REVENUE powers.	
Benches of Magistrates.		
Magistrates of the first class exercising only	CRIMINAL powers.	
Magistrates of the first class exercising also	REVENUE powers.	
Magistrates of the first class exercising also	REVENUE and CIVIL powers.	
Magistrates of Districts exercising only	CRIMINAL powers.	
Magistrates of Districts exercising also	REVENUE powers.	
Magistrates of Districts exercising also	REVENUE and CIVIL powers.	
Magistrates exercising the powers described by Section 36, Act X of 1872.		
Courts of Session.		
Moonsiffs exercising only	CIVIL powers.	

Moonsiffs exercising also REVENUE powers.

Moonsiffs exercising also CRIMINAL powers.

Moonsiffs exercising also REVENUE and CRIMINAL powers.

Small Cause Courts exercising no other functions.

Judges of Small Cause Courts exercising also ordinary CIVIL (or REVENUE) powers.

Judges of Small Cause Courts exercising also CRIMINAL or REVENUE as well as CIVIL powers.

Subordinate Judges without other functions.

Subordinate Judges exercising Jurisdiction of Small Cause Court Judge.

District Judges.

Judicial Commissioners with powers of ditto.

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CIRCULAR
ORDERS.

CIVIL CIRCULAR ORDER No. 2.

Dated Calcutta, the 26th January 1874.

THE orders noted on the margin are hereby superseded, and

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

the Quarterly Statements A, B, and

C will henceforth be submitted by

the District Judges to the High

Circular Order No. 31, dated 4th
November 1870, paras. 1 to 6.

Court in the revised forms now

circulated, commencing, where they have not been already adopted, with those for the 1st Quarter of 1874.

2. Statements received in other than the printed forms supplied by the Superintendent of Stationery will be returned, and the District will be dealt with as if no Statements had been received.

3. Statement A will contain the total number of original suits before each of the Civil Courts in the District during the Quarter. The first column marked "Class of Courts" will contain the designation of each Civil Court in the District. Column 5 intended to show suits received "by institution" will include cases received *on remand* from a higher Court, or admitted to *review*; but such cases should be noticed also in the column of remarks. It will be seen that, in the other columns, the cases dealt with by transfer have been distinguished from other cases under both the general heads "Received" and "Disposed of," separate columns having been allotted to them, so that the figures in red ink prescribed by Circular Order No. 25, dated 12th August 1871, will no longer be necessary. The

1874 . instructions, however, contained in Circular Order No. 28, dated
CIRCULAR 12th October 1871, as to the nature of the transfers intended,
ORDERS. will apply to the new columns.

4. Part II.—With reference to explanations of the cause of delay, District Judges will be guided by Circular Orders No. 6, dated 15th February 1873, and No. 25, dated 30th December 1873.

5. Statement B.—Whenever the columns showing cases *received* “by transfer” under each of the several classes differ from the corresponding columns for cases *disposed of* “by transfer,” an explanation of the discrepancy should be given in the column of remarks. When a case is remanded under Section 351, Civil Procedure Code, it is to be treated as *decided* by the Appellate Court, disappearing from its original file, and should be accounted for as *disposed of by transfer*; but where an order is made under Section 354, the case ought not to be removed from the file of the Appellate Court; but shown as *pending*. When a case is received by the Appellate Court under an order of the High Court in special appeal, it will be shown as *received* “by transfer,” and, after disposal, will be shown as *disposed of* either by “final order” or “by transfer,” according as it has been dealt with under Section 354, or remanded to the Original Court. Red ink figures need not be given.

6. Part II.—The remarks already made in connexion with Part II of Statement A apply *mutatis mutandis* to Part II of Statement B.

7. Statement C is intended to exhibit all miscellaneous cases instituted and disposed of by the various Judicial Courts in the District. All business heretofore entered in the Statements under the head of “Other Miscellaneous Proceedings,” and which for the most part consists of reports, answers to or orders upon proceedings from other Courts, applications from Ministerial Officers, &c., must be carefully excluded, and nothing but *real* cases requiring a Judicial finding and order should be entered. Proceedings under Section 45 and Section 75, Act VIII (B. C.) of 1869, for example should not be included in Statement C.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

A.
District of *Quarter of 1874.*
 ORIGINAL SUITS.

CLASS OF COURTS.	PENDING FROM THE LAST QUARTER.				SUITS RECEIVED.			SUITS DISPOSED OF.				PENDING.				REMARKS.
	Small Cause Court.	Rent.	Other.	Total.	By institution.	By transfer.	Total.	By transfer.	On trial.	Otherwise.	Total.	Small Cause Court.	Rent.	Other.	Total.	
District Judge	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Additional Judge...	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Subordinate Judge	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Total	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..

District Judge.

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 CIRCULAR
 ORDERS.

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CIRCULAR
ORDERS.

PART II.
Detail of Pending Cases.

CLASSES OF COURTS.	SMALL CAUSE COURT CLASS PENDING.			RENT-SUITS PENDING.			OTHER CASES PENDING.			REMARKS.	
	More than 6 weeks.	More than 3 months.	More than 1 year.	More than 6 weeks.	More than 3 months.	More than one year.	More than 3 months.	More than 6 months.	More than 1 year.		
District Judge	...										
Additional Judge	...										
Subordinate Judge	...										
Total	...										

District Judge.

1874

CIRCULAR ORDERS.

PART II.

Detail of Pending Appeals.

[illegible]

C.
District of *Quarter of 1874.*
 MISCELLANEOUS ORIGINAL CASES.

CLASS OF COURTS.	REMAINING FROM LAST QUARTER.	RECEIVED		Total.	DISPOSED OF		Pending.	OF WHICH PENDING			REMARKS.
		By Institution.	By Transfer.		By final Order.	By Transfer.		More than 6 Weeks.	More than 3 Months.	More than 1 Year.	
District Judge ...											
Additional Judge ...											
Subordinate Judge ...											
Total ...											

8—B

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CIRCULAR
ORDERS.*District Judge.*

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CIRCULAR
ORDERS.

PART II.

Miscellaneous Appeals.

CLASS OF COURTS.	REMAINING FROM LAST QUARTER.	RECEIVED		DISPOSED OF.		PENDING.	OF WHICH PENDING			REMARKS.
		By Institution.	By Transfer.	By final Order.	By Transfer.		More than 6 Weeks.	More than 3 Months.	More than 1 Year.	
District Judge ...										
Additional Judge ...										
Subordinate ...										
Total ...										

District Judge.

CIVIL CIRCULAR ORDER No. 3.

. 1874

CIRCULAR
ORDERS.*Dated Calcutta, the 9th February 1874.*

THE Court are pleased to direct that outline thakbust maps be not received as evidence unless accompanied by the *survey* map of the locality.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

2. But this order is not to exclude the reception of khetbut maps when produced for the purpose of showing detailed internal measurements or field survey.

3. The Court think it proper also to impress on all judicial officers, how important it is that copies of survey maps should be made only by persons actually acquainted with drafting and surveying.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

No. 379.

FROM

THE OFFICIATING REGISTRAR OF THE
• HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

TO

THE JUDGE OF THE COURT OF SMALL CAUSES,
HOOGHLY, &c.

Dated Calcutta, the 10th February 1874.

SIR,—With reference to your letter No. 6, dated 2nd February 1874, in which you report that

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

the subordinate clerks of your establishment, whose posts were abolished by the Resolution of the Government of Bengal, dated 7th March 1873, worked until the 20th January 1874, I am directed to observe that these officers ought not to have been so retained; it was known to all the officers concerned that the arrangements sanctioned by that Resolution came into force on the 1st January 1874, and if the tenor of the official instructions you had received left any doubt on your mind, you should have communicated with the Court. In any case, however, the ministerial

1874 *
CIRCULAR
ORDERS.

officers concerned have, in the opinion of the Court, no claim to allowances for the period in question.

I have, &c.,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIVIL CIRCULAR MEMO. No. 2.

Dated Calcutta, the 10th February 1874.

COPY forwarded to all Judges of Small Cause Courts for their information and guidance.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIVIL CIRCULAR ORDER No. 4.

Dated Calcutta, the 12th February 1874.

IN supersession of Circular Order No. 27, dated 10th August

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

1872, the Court are pleased to direct that the accounts prescribed in Circular Order No. 9 of the 8th March 1872 be kept in the English language wherever the presiding officer understands English and an English writing clerk is procurable.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIVIL CIRCULAR MEMO. No. 3.

Dated Calcutta, the 13th February 1874.

THE Court finds it necessary to point out that, in lieu of the

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

title "Additional Moonsiff" now used in some districts where more than one Moonsiff is appointed to a Chowkey, the Moonsiff should be designated "1st Moonsiff," "2nd Moonsiff," and so on, according to seniority.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIVIL CIRCULAR MEMO. No. 4.

. 1874

CIRCULAR
ORDERS.*Dated Calcutta, the 14th February 1874.*

THE attention of all Civil Courts subordinate to the High

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

Court is drawn to the direction in paragraph 2 of Circular Order No. 3, dated 17th January 1871, as to the punching of stamps affixed to documents issued by them at the time the stamps are affixed; and it is ordered that the duty be assigned in every Court to a specified responsible officer.

2. Blank papers for copies should, as usual, be presented with the application; but it is not necessary in such cases that stamps should be affixed to the blank papers; it will be enough if the adhesive stamp be made over to the officer whose duty it is to cancel stamps, and that officer will, if the request for a copy be allowed, at once affix the stamps to the paper and cancel it by punching, but if it be not allowed, he will return the adhesive stamp to the petitioner, a note to this effect being made in the Register and signed by such officer.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

CIVIL CIRCULAR MEMO. No. 5.

Dated Calcutta, the 18th February 1874.

EVERY District Judge and Judicial Commissioner, subject to

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

the control of the High Court, is requested to forward to this office, within fifteen days after the 1st April next, a correct list, according to the enclosed form, of the Advocates and Pleaders practising in his own Court and in each Moonsiff's Court in his District.

2. The different classes of Pleaders, senior and junior, should be carefully discriminated, and the Government Pleader should be described as such.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Officiating Registrar.

1874.

CIRCULAR
ORDERS.*District Court and Subordinate Judge's Court of*

Name of Advocate or Pleader.	Nature of Qualification. (A.)	Date of Qualification.	Date of last License.	REMARKS.
				(A) e.g., "Advocate of High Court," "B. L. Vakeel of High Court," "1st grade Diploma-holder," &c., &c.

Small Cause Court of and Moonsiff's Court.

Name of Pleader.	Nature of Qualification.	Date of Qualification.	Date of last License.	REMARKS.
				Those who held license for both Courts should be distinguished.

CRIMINAL CIRCULAR MEMO. No. 1.

*Dated Calcutta, the 19th February 1874.*1874
CIRCULAR
ORDERS.

As Honorary Magistrates in some Districts are now exceedingly numerous, but, as a general rule, they singly try few cases, the Court directs that in the first column of Statement D, Part I, the Honorary Magistrates who have acted singly may be entered together and their cases exhibited in one line. But benches of Magistrates, however composed, should be exhibited separately, one line to each, thus:—

Sudder bench of Magistrates _____
 Ferozepore „ „ _____
 Honorary Magistrates sitting singly _____

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

CIVIL CIRCULAR ORDER No. 5.

Dated Calcutta, the 24th February 1874.

THE High Court have had frequent occasion to observe that the provisions of section 30 of the Court Fees Act are not always complied with, and that consequently stamps are fraudulently used a second time.

2. Too strict a compliance with the provisions of this section cannot be enjoined, and in all cases it should be carefully seen that the figure head of the Court Fee Stamps is punched out, and the piece destroyed before any action is taken upon the documents to which the stamps may have been attached.

3. The Court now notify that, where neglect or insufficient compliance with the law appear to be habitual, they will invariably hold the presiding officer of the Court, where defalcations may ensue, personally responsible.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Offg. Registrar.

1874

CIRCULAR
ORDERS.

CIVIL CIRCULAR ORDER No. 6.

Dated Calcutta, the 24th February 1874.

THE Court are pleased to notify, for the information and guidance of District Judges and Judicial Commissioners, that declarations issued by order of the Court immediately after the passing of Act XX of 1865, to the effect that an applicant for enrolment as a pleader "will be enrolled on resigning his public employment," are not to be considered as entitling parties to be so enrolled on resignation many years after the passing of the Act: and that accordingly no future applications for enrolment under these declarations will be entertained.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

CIVIL CIRCULAR ORDER No. 7.

Dated Calcutta, the 4th March 1874.

THE Court is pleased to prescribe, for adoption by the Subordinate Civil Courts, the accompanying form of *Fehrist* or list of cases to accompany the records of all decided cases sent in by Subordinate Judges and Moonsiffs for deposit in the District Judge's office.

2. These statements on printed forms are to be always uniform in size and shape, in order to be bound up so as to constitute a register of decided cases useful for the purpose of tracing and identifying records.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

No. from List.	No. from Court's Register.	Description of Case.	Date of Decision.	Numbered Papers or Papers contained in the Nutcase.	REMARKS.	1874
						CIRCULAR ORDERS.
1	10 of 1873	Regular Rent Suit	4th Oct. 1873	121		
2	67 of 1872	Miscellaneous ...	5th Jany. 1873	97		
3,&c.	19 of 1872	Regular S. C. Court	4th Feby. 1873	54		

CIVIL CIRCULAR MEMO. No. 6.

Dated Calcutta, the 4th March 1874.

IN connexion with, and in modification of, Circular Orders

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

C. O. No. 30, dated 10th October 1868, paragraph 8.

C. O. No. 26, dated 5th September 1871.

C. O. No. 81, dated 25th September 1867, paragraph 5.

cited on the margin, in so far as they relate to the receipt of travelling allowance from Government by Nazirs or other public officers, the attention of the Civil Courts subordinate to the High Court is drawn to the Notification of the Government of India, in the Financial Department, No. 929, dated 5th February 1874,* ruling that "no public servant shall draw travelling allowances for a journey taken from his head-quarters to visit any place not more than five miles distant therefrom."

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

* *Vide Calcutta Gazette* of 11th February 1874, Part I, p. 361.

1874 .

CIRCULAR
ORDERS.

CIVIL CIRCULAR MEMO. No. 7.

Dated Calcutta, the 6th March 1874.

THE Court is pleased to direct that, in the preparation of
 JUDICIAL STATEMENTS (annual) Nos. 8
 and 9, prescribed by Circular Order
 No. 32, dated 8th November 1870,

HIGH COURT.
 ENGLISH DEPARTMENT.
Civil.

cases in course of transfer, when the year closes, shall be shown
 in the returns for that year as pending in the Court to which
 they have been transferred. The Court expect accordingly that,
 in the returns for 1873, all cases transferred on or before 31st
 December will be accounted for by the Courts to which they
 belong in consequence of such transfer.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

CIVIL CIRCULAR ORDER No. 8.

Dated Calcutta, the 7th March 1874.

It having been brought to the notice of the Court that, in one
 of the districts within the Court's
 jurisdiction, the practice of taking
 formal contemporaneous proof of the
 service of notice in foreclosure proceedings under Regulation
 XVII of 1806 is not observed, the Court are pleased to direct
 that, if in any other district a similar omission prevails, the pro-
 per practice should be introduced.

HIGH COURT.
 ENGLISH DEPARTMENT.
Civil.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

CIVIL CIRCULAR ORDER No. 9.

1874

CIRCULAR
ORDERS.*Dated Calcutta, the 7th March 1874.*

It having been brought to the notice of the Court that, in some districts, the Appellate Courts do not transmit to the Lower Courts copies of the judgments passed by them in appeal, the Court are pleased to direct that, as a general rule for the purposes of section 361 of the Civil Procedure Code, the term "decree" shall be taken to include the judgment, and to desire that, in all cases of appeal, the Appellate Court will transmit to the Lower Court a copy of the judgment passed as well as of the decree. It is right and very desirable that the Lower Court, especially if its decision be reversed or modified, should have an opportunity of seeing the judgment of the Appellate Court.

HIGH COURT.
ENGLISH DEPARTMENT.
Civil.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

CIVIL CIRCULAR ORDER No. 10.

Dated Calcutta, the 7th March 1874.

THE attention of all District Judges and District Magistrates, as well as of the Civil and Criminal Authorities subordinate to them, is drawn to the rules drawn up by the Court under Section 20 of the Court Fees Act of 1870, notified in the *Calcutta Gazette* of the 25th February 1874, Part I, pp. 476 *et seq.*, and to the rules drawn up under Section 22 of the same law (VII of 1870), notified at page 480 of the same issue of the *Gazette*.

2. Immediate effect must be given to these rules.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

10—B

1874

CIRCULAR
ORDERS.

RULES RELATING TO SPECIAL APPEALS.

1. The paper-book in all cases of special appeal, except appeals not exceeding Rs. 50 in value, will consist of the following papers: those not originally in the English language being translated into English:—

(a).—*The Plaint.*

Note.—Lengthy schedules and descriptions of boundaries appended to plaints may be omitted.

(b).—*The plaintiff's written statement, if any.*

(c).—*The defendant's written statement.*

Note.—When there are several sets of defendants in a suit, the written statements of defendants, not parties to the special appeal either as appellants or respondents, may be omitted.

(d).—*The judgment of the first Court.*

(e).—*The judgment of the Lower Appellate Court.*

(f).—*Any judgments or orders of remand passed in the case either by the Lower Appellate Court on appeal or by the High Court on special appeal.*

(g).—*The memorandum of special appeal.*

(h).—*A front leaf* containing the number of the cause, names of the Judges of the two Courts below, names of the parties and of their vakeels, date of the institution of the suit, date of the judgment of the first Court, date of the judgment of the Lower Appellate Court, date on which the special appeal was filed, date of service of notice upon the respondents, and date on which the cause was ready for hearing.

2. In each case of special appeal, the Deputy Registrar will cause to be printed 12 copies of the paper-book as aforesaid for the use of the Judges of the High Court and of the parties or their vakeels; the copies furnished to the parties or their vakeels being charged and previously paid for at the rate of Rs. 5 a copy, in the manner following.

3. The appellant, at the time of filing the memorandum of special appeal, and the respondent, at the time of entering appearance through a vakeel or attorney of the High Court, will

deposit with the Accountant the costs of one or more copies of the paper-book as may be required, at the rate of Rs. 5 a copy. The costs so paid to be costs in the cause, provided that no more than the costs of one copy be allowed, unless specially ordered by the Court.

• 1874
CIRCULAR
ORDERS.

4. When the cause is ready for hearing, the Deputy Registrar will furnish the vakeels or attorneys engaged on either side with copies of the paper-book, for which costs shall have been deposited as aforesaid. The issue of paper-books to the vakeels or attorneys will be notice to them that the case is ready for hearing.

5. No memorandum of special appeal filed through a vakeel or attorney of the High Court, nor a *first* vakalutnamah or power of attorney for the appearance of the respondents, will be admitted or received, unless, at the time of representation, the costs of at least one copy of the paper-book be deposited with the Accountant under Rule 3.

Provided that any second or other vakalutnamah or power of attorney for the appointment of new vakeels or attorneys, or re-appointment of former vakeels or attorneys by representatives of deceased parties, may be filed without such deposit.

6. In analogous cases governed by one judgment, the Court, on application, will make a special order.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
CHARLES PONTIFEX.
W. AINSLIE.
E. G. BIRCH.
G. G. MORRIS.

The 12th March 1874.

1874

CIRCULAR
ORDERS.

CIVIL CIRCULAR ORDER No. 11.

Dated Calcutta, the 14th March 1874.

THE returns made to the Court for 1872-73, under Circular
 Order No. 12, dated 8th April 1872,
 HIGH COURT. having been found inaccurate owing
 ENGLISH DEPARTMENT. to the inclusion in column 2* of com-
 Civil.

mission on execution sales where such sales have been effected
 by the Nazir or other officer not being a Civil Court Ameen,
 and the object of the Circular Order being to ascertain the
 financial results of the employment of Ameens only, the Court
 are now pleased to prescribe the accompanying forms of regis-
 ters to be kept up in all the regular Civil Courts subordinate to
 the High Court.

2. The register of receipts, it will be seen, has been so framed
 as to exclude all moneys not due to the employment of Civil
 Court Ameens; and the register of disbursements so as to show
 only salaries paid and excess payments refunded. The first
 return to be submitted in this form of statement will be for the
 financial year 1873-74.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

* "Receipts on account of the employment of Ameens permanently
 entertained."

Register of Receipts on account of Civil Court Ameens. District of

Date.	Court.	Nature of Employment.	Ameen Employed.	Time Occupied.	Amount.			REMARKS.
					Rs.	As.	P.	
1st Jany.	Sub-Judge	Local investigation, Mon- zah Santoshpore.	Sheikh Dilawan	10 days	50	0	0	20 refunded.
3rd "	Munsiff of Sundip	Sale of moveables	R. C. Doss	1 day	5	0	0	

1874

CIRCULAR
ORDERS.

1874

CIRCULAR
ORDERS.

Register of Expenditure on account of Civil Court Amoen.

District of

Date.	Nature of Expenditure.	Amount.			REMARKS.
		Rs.	As.	P.	
2nd January ...	Salary of Dilawan ...	70	0	0	
3rd " ...	Refund over charge in case of deposited.	15	0	0	

CIVIL CIRCULAR ORDER No. 12.

Dated Calcutta, the 27th March 1874.

THE attention of the Civil Courts subordinate to the High Court is drawn to the rules published by Notification dated 5th March 1874, in the *Calcutta Gazette* of the 11th

idem, Part I, p. 557, to take effect from the 9th March 1874, as to fees and charges of the High Court in its original jurisdiction.

2. It will be seen that Schedule 5* of the tables published therein (which is reproduced as an Appendix to this Circular Order) supersedes the scale of fees promulgated with Circular Order No. 188, dated 7th October 1852, as well as the rates mentioned in Circular Memo. No. 2, dated 21st February 1870, and Circular Memo. No. 4, dated 16th February 1872.

By order of the High Court,

(Sd.) H. J. S. COTTON,
Offg. Registrar.

Fees and Charges to be allowed to the Sheriff.

• 1874

Rs. As. P.

RULES.

1. For arresting each person named in a writ when
nothing is realized 16 0 0
Otherwise 2 0 0
- Note.*—The latter fee to be allowed, *plus* poundage on sums levied.
2. For executing any attachment against moveable or
immoveable property 2 0 0
3. For serving each juryman with summons 2 0 0
(To be charged to the Fine Fund.)
4. For serving every other summons, for each person
served 2 0 0
5. For executing every writ of *Habeas Corpus*, injunction,
or other writ for which a fee is not specially
provided, each person against whom the writ is
directed 2 0 0
6. For executing warrants for apprehension of witnesses,
and warrants for security to be furnished by defendant
(issued by another Court), for each person 4 0 0
7. For serving summons, notice, proclamation, subpoenas,
&c. (issued by another Court), for each person
served 2 0 0
8. For serving citation 2 0 0
9. For every ordinary return 1 0 0
10. For every special return 2 0 0
11. For translations when necessary, per folio 0 8 0
12. For every warrant to discharge defendant from
custody 2 0 0
13. For bringing up defendant from jail after remand 2 0 0
14. For every certificate of seizure 5 0 0
15. For every other certificate 2 0 0
16. For drawing every security bond in mofussil cases 8 0 0
17. For office copies, per folio 0 8 0
18. For attending Court or before a Judge or other officer
of Court with papers 3 0 0
19. For every bond of indemnity for seizing property, &c.,
when there are adverse claims 32 0 0
20. For every search when no certificate of office copies
obtained 1 0 0

1874 •

Rs. As. P.

RULES.

21. Poundage on sums levied by the Sheriff in execution, for the first Rs. 1,000 at 5 per cent., and for the rest 2½ per cent.				
22. Poundage on a writ of possession upon every Rs. 10 of the yearly value	...	...	...	0 8 0
23. For attending Court during each Criminal Sessions, per diem	...	...	...	16 0 0

(To be charged to the Fine Fund.)

Balliffs for executing Summons, &c.

European. Native.
Rs. As. P. Rs. As. P.

1. For serving summons—

As to defendants residing in the same house when served personally, or when service effected by delivery of the summons to one person—

For the first defendant	...	4 0 0	1 0 0
For every other defendant	...	2 0 0	0 8 0

By fixing a copy to the door of the dwelling-house—

For all the defendants residing in the same house who may be thus served	...	6 0 0	2 0 0
--	-----	-------	-------

2. In other cases for—

Serving each defendant	...	4 0 0	0 8 0
------------------------	-----	-------	-------

3. For serving citations	...	2 0 0	1 0 0
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4. For arresting a party	...	16 0 0	4 0 0
--------------------------	-----	--------	-------

5. For bringing him up before the Court, when the Sheriff's officer is detained in Court for three hours and upwards	...	8 0 0	2 0 0
Otherwise	...	4 0 0	1 0 0

If the party be arrested after the rising of the Court, for bringing him up before the Court on the following day and lodging him in jail after committal	...	8 0 0	2 0 0
---	-----	-------	-------

Note.—This fee is to be reduced to Rs. 4 and Re. 1 if the party on being brought up should be released.

	European.			Native.			. 1874 RULES.
	Rs.	As.	P.	Rs.	As.	P.	
If the party be released, upon security, to appear on another day, for attending the Court to take him into custody ...	4	0	0	1	0	0	
For lodging him in jail, if committed ...	4	0	0	1	0	0	
6. For every affidavit of service of summons	2	0	0	0	8	0	
7. For attaching moveable property ...	16	0	0	0	0	0	
8. For attaching or giving possession of immoveable property, for the first parcel ...	16	0	0	0	0	0	
For every other parcel ...	2	0	0	0	0	0	

HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Notification.

THE following rules made by the High Court of Judicature at Fort William in Bengal, pursuant to Section 20, Clauses 1, 2, and 3 of the Court Fees Act, 1870, having been confirmed by the Lieutenant-Governor of Bengal, and sanctioned by the Governor-General of India in Council, are now published.

H. J. S. COTTON,
Offg. Registrar.

HIGH COURT,
The 23rd February 1874. }

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with Clause I, Section 20 of the Court Fees Act of 1870, declaring the Fees chargeable for serving and executing Processes issued by the High Court in its Appellate Jurisdiction, and by the other Civil and Revenue Courts established within the Limits of such Jurisdiction.

RULE I.—The fees exhibited in the following table shall be

1874. charged for serving and executing the several processes against
 RULES. which they are respectively ranged :—

TABLE OF FEES.

PART I.—In the High Court, Appellate Jurisdiction.

	Proper Fee.
	Rs. As. P.
<i>Article 1.</i> —Every summons, subpoena, rule, notice, proclamation, injunction, or other order not elsewhere specified in this table, Part I ...	3 0 0
<i>Article 2.</i> —Every commission to make a local investigation, or to take evidence, or for any other purpose—	
(a) in respect of the commission ...	3 0 0
(b) in respect of the remuneration of the commissioner, i.e., person who is to execute the commission, per diem...	Such sum as the Court may direct.

Note.—A sum, sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (a) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commissioner's report or other return to the commission is used.

	Rs. As. P.
<i>Article 3.</i> —Every warrant for arrest of the person ...	3 0 0

PART II.—In the Courts of Judges and Subordinate Judges, and in the Revenue Courts when the Suit in the Revenue Courts in which the Process is issued is valued at a Sum exceeding Rs. 1,000.

	Rs. As. P.
<i>Article 1.</i> —Every summons, subpoena, notice, proclamation, injunction, or other order not elsewhere specified in this table, Part II ...	2 0 0
<i>Article 2.</i> —Every commission to make a local investigation, or to take evidence, or for any other purpose—	
(a) in respect of the commission ...	2 0 0
(b) in respect of the remuneration of the commissioner, i.e., person who is to execute the commission, per diem...	3 0 0

Note.—A sum, sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (a) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commissioner's report or other return to the commission is used.

1874
RULES.

	Rs.	As.	P.
<i>Article 3.</i> —Every process of attachment of property by notice or proclamation... ..	2	0	0
<i>Article 4.</i> —Every process of attachment of property by actual seizure—			
(c) in respect of warrant of attachment .	2	0	0
(d) in respect of each man, necessary to ensure safe custody, who is left in possession, per diem	0	6	0

Note.—A sum, sufficient to cover the daily fee (d) for a period of at least one month, must be paid in addition to the fee (c) at the time when the process is obtained; and, if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

	Rs.	As.	P.
<i>Article 5.</i> —Every process of attachment by the arrest of the person	15	0	0
<i>Article 6.</i> —Every order for the sale of property—			
(e) in respect of the order of sale ...	2	0	0
(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000... ..	2	p. ct.	
together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of	1	p. ct.	

Note.—The portion (e) of this fee must be paid when the process is obtained, and the poundage (f) must be paid at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

PART III.—In the Courts of Moonsiffs and of Small Causes, and in the Revenue Courts, when Part II does not apply.

	Rs.	A.	P.
<i>Article 1.</i> —Every summons, subpoena, notice, proclamation, injunction, or other order not elsewhere specified in this table, Part III	1	0	0

1874

RULES.

Rs. A. P.

Article 2.—Every commission to make a local investigation, or to take evidence, or for any other purpose—

(a) in respect of the commission	...	1	0	0
(b) in respect of the remuneration of the commission, i.e., person who is to execute the commission, per diem.		3	0	0

Note.—A sum, sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (a) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum sufficient to cover the daily fee (b) for the excess period, extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the commissioner's report or other return to the commission is used.

Rs. As. P.

Article 3.—Every process of attachment of property by notice or proclamation...

2 0 0

Article 4.—Every process of attachment of property by actual seizure—

(c) in respect of the warrant of attachment	2	0	0
(d) in respect of each man, necessary to ensure safe custody, who is left in possession, per diem	...	0	6 0

Note.—A sum, sufficient to cover the daily fee (d) for a period of at least one month, must be paid in addition to the fee (c) at the time when the process is obtained; and, if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

Rs. As. P.

Article 5.—Every process of attachment by the arrest of the person

15 0 0

Article 6.—Every order for the sale of property—

(e) in respect of the order of sale	...	2	0	0
(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000...		2	p. ct.	
together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of		1	p. ct.	

Note.—The portion (e) of this fee must be paid when the process is obtained, and the poundage (f) must be paid at the time of making application for payment of the proceeds of sale out of Court, as hereinafter provided.

1874
RULES.

RULE II.—Notwithstanding Rule I, no fee shall be chargeable for serving and executing any process, such as a notice, rule, summons or warrant of arrest, which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of, and punishing any act done, or words spoken, in contempt of its authority.

RULE III.—No process which comes within the operation of Rule I shall be drawn up for service or execution, except upon an application made to the Court for that purpose in writing on a document bearing upon its face stamps not less in amount than the fee which by Rule I is directed to be charged for serving and executing the process so sought to be drawn up. This application may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process fee in addition to such stamps, if any, as are needed for its own validity; and, in either case the filing of the application thus duly stamped, shall constitute payment of the fee chargeable for the process.

RULE IV.—In cases which are covered by the note to Article 2 of Part I, and the note to Articles 2 and 4 of Parts II and III of the Table of Fees in Rule I, the additional fee, which may become payable after the process has been actually issued, shall be paid by filing a written requisition to the Court to receive the fee, which document shall bear on the face of it stamps not less in amount than the additional fee, together with a memorandum of the purpose for which it is paid.

RULE V.—The proceeds of a sale effected in execution of any decree will only be paid out of Court on an application made for that purpose in writing, and the additional fee (f), Article (6), Parts II and III, must be paid by stamps affixed to, or impressed upon, the first of such applications: whether it be or be not made by the person who obtained the order for

				Rs.	As.	P.	1874
							RULES.
(2) Summons	...	...	In respect of every additional person named therein ...	0	4	0	
(3) Proclamation for absconding party under Section 171, Code of Criminal Procedure	...	...	For the proclamation	2	0	0	
(4) Proclamation for witness not attending, Section 353	...	...	For the proclamation	1	0	0	
(5) Warrant of attachment	...	...	For the warrant	1	0	0	
Where it is necessary to place officers in charge of property attached, for each officer so employed, per diem				0	4	0	
(6) Warrant of levy of fine or of maintenance to wife, children, &c.	...	...	For the warrant	1	0	0	
And a percentage on the amount of fine or maintenance levied, viz., 2 per cent. on sums not exceeding Rs. 100; and where the sum exceeds Rs. 100, then 2 per cent. on Rs. 100, and 1 per cent. on the amount of excess.							
(7) Written order	...	...	For the order	1	0	0	
(8) Injunction	...	...	For the injunction	1	0	0	
(9) Notice	...	...	For the notice	1	0	0	

II. Nothing herein contained shall be deemed to authorize the levying of any fee for any summons to attend as a Juror or Assessor in a Court of Session, and no fee shall be chargeable in any such summons.

III. No fee shall be chargeable in advance on any process of Criminal Court in any case where the prosecution is on the part of Government, but it shall be competent to any Magistrate in such case, if the accused is convicted, to order that such fees shall be paid by the accused, or any of them, in like manner as if such fees had been paid by the prosecutor in the first instance.

1874

RULES.

IV. Where any percentage is directed by these rules to be taken upon amounts levied as fines or maintenance, such percentage shall be deducted from the proceeds of any property sold, or shall be paid together with the amount levied, and with the other costs of process as stated in the warrant.

V. When a proclamation has been issued for an absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation.

VI. In Districts named in the margin, where the sub-divisional system has not been fully introduced, in every case where a process has to be executed at a distance more than 25 miles from the Court from which it is issued, an addition of one-fourth is to be made to the fee chargeable, and if more than 50 miles, an addition of one-half.

Rajshahya, Bograh, Dinagore, Malda, Rungpore, Bankoorah, Beerbhoom, Cachar, Chittagong, Noakhally, Singbhoom, and Nowgong.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
CHARLES PONTIFEX.
W. AINSLIE.
E. G. BIRCH.
G. G. MORRIS.

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with Clause III, Section 20 of the Court Fees Act, 1870. . 1874
RULES.

1. The following monthly salaries shall be allowed to the Nazir and other persons employed in the service or execution of processes of the Civil Courts:—

1st.—In the Court of District Judge—

	Rs.
The Nazir being the person responsible for due service and execution of all processes in the Courts at the Sudder Station	100
Rising by increments to... ..	200
His Clerk or Taidnavis	10
Peons, 2nd grade	8
„ 1st grade, after three years' approved service...	10

2nd.—In the Court of the Subordinate Judge or Small Cause Court—

Najib Nazir, Rs. 25 to 35, according to circumstances.
Peons, as in Judge's Court.

3rd.—In the Court of Sudder Moonsiff—

	Rs.
Najib Nazir	20
Peons, 2nd grade	6
„ 1st grade, after three years' approved service...	8

4th.—In the Courts of Moonsiffs not at the Sudder Station—

	Rs.
Najib	25
Peons, 2nd grade	6
„ 1st grade, after three years' approved service...	8

5th.—Small Cause Courts—

Najib, }
Peons, } as at present.

Peons in the Revenue Court of a Collector shall be remunerated as those in the Court of the District Judge. Peons in the Revenue Court of a Deputy Collector shall be remunerated as those in the Court of a Moonsiff.

2. The following monthly salaries shall be allowed to Peons

1874 . and other officers employed in the service or execution of pro-
 RULES. cesses in the Courts of Magistrates :—

1st.—In the Court of the Magistrate of the District,—

Court Inspector (or Nazir) responsible for the due service and execution of all processes in the Courts of the several Magistrates at the Sudder Station, as at present.

Rs.

Peons, each 7

2nd.—In Sub-Divisional Magistrates' Courts—

Court Inspector (or Nazir) of Sub-Division, as at present.

Rs.

Peons, each 7

Notes.—The rates of remuneration for Peons provided by these rules are intended to secure the services of men who can read and write. But whenever, on the occurrence of a vacancy, candidates thus qualified shall not be available, the Court, on whose establishment the vacancy exists, may record a declaration to that effect, and may then appoint temporarily some person whom it may consider competent to perform the duties, and who shall be paid at the rate of Rs. 5 per mensem in Moonsiffs' Courts, and Rs. 6 per mensem in all other Courts. Provided that such appointment, when made by a Court subordinate to the District Judge, or the Magistrate of the District, shall be subject to the approval of such Judge or Magistrate, and shall cease as soon as duly qualified candidates shall be procurable.

R. COUCH.
 F. B. KEMP.
 LOUIS S. JACKSON.
 J. B. PHEAR.
 A. G. MACPHERSON.
 W. MARKBY.
 F. A. GLOVER.
 CHARLES PONTIFEX.
 W. AINSLIE.
 E. G. BIRCH.
 G. G. MORRIS.

HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

Notification.

THE following are the rules by the High Court of Judicature at Fort William in Bengal, and approved by the Lieutenant-

Governor of Bengal and by the Governor-General of India in Council, under Section 22 of the Court Fees Act, 1870. 1874
RULES.

HIGH COURT,
The 23rd February 1874. }

H. J. S. COTTON,
Offg. Registrar.

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with Section 22 of the Court Fees Act, 1870.

1st.—The Judge of every District in the Regulation Provinces shall ascertain the average number of processes issued from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2nd.—To this shall be added, in the Districts to which Act VIII of 1869 (B.C.) has been extended, the average of processes issued by the Revenue Courts of the same District.

3rd.—The Peons to be employed in each District shall be in number sufficient for the execution of a like number of processes; each Peon being for this purpose considered capable of executing—

In the Zillah Court and the Subordinate Judge's Court,	Rs.
per annum	200
In the Moonsiff's Court, per annum	250
In the Courts of Small Causes, per annum	300

4th.—In order to provide for the service of processes of certain kinds, which occupy a longer period, and in respect of which a higher fee is charged, 25 per cent. may be added in each case to the average ascertained under the 1st and 2nd Rules.

5th.—In the Districts named in the margin, where the Peons

Backergunge.
Dacca.
Jessore.
Sylhet.
Kamroop.
Nowgong.
Luckimpore.

Chittagong.
Dinapore.
Mymensingh.
Rajshahye.
Rungpore.

entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each Peon is expected to serve may be reduced by one-third, and the number of Peons to be employed shall be calculated accordingly.

N.B. — For the districts in the second column, the calculation is to be made from May to October inclusive only.

1874 •
RULES.

6th.—Where there are in any District several Courts of any one class, the Judge may authorize the appointment of such number of Peons on the whole for such Courts as may suffice for executing the total number of processes, and may from time to time apportion such Peons according to need among such Courts.

7th.—When it appears to the District Judge that the number of processes issued out of any Court or class of Courts in the District has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of Peons, and if there shall be a diminution to the like extent, or if he shall be satisfied that the processes of all or any of such Courts can be executed by a smaller number of Peons, it shall be his duty to make a reduction accordingly.

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with Section 22 of the Court Fees Act, 1870.

1st.—The Magistrate of every District shall ascertain the average number of processes issued in a year from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2nd.—The Peons to be employed in each District shall be in number sufficient for the execution of a like number of processes; each Peon being for this purpose considered capable of executing 300 processes per annum.

3rd.—In the Districts named in the margin, where the Peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each Peon is expected to serve may be reduced by one-third, and the number of Peons to be employed shall be calculated accordingly.

Baekergunge.	Chittagong.
Dacca.	Dinapore.
Jessore.	Mymensingh.
Sylhet.	Rajshahye.
Kamroop.	Rangpore.
Nowgong.	
Luckimpore.	

N.B.—For the districts in the second column, the calculation is to be made from May to October inclusive only.

4th.—Where it appears advisable to the Magistrate of the District, he may authorize the appointment of such number of Peons on the whole for all the Courts in his District as may

suffice for executing the total number of processes of those Courts, and may from time to time apportion such Peons according to need among such Courts.

. 1874
RULES.

5th.—When it appears to the District Magistrate that the number of processes issued out of any Court or Courts in the District has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of Peons, and if there shall be a diminution to the like extent, or if he should be satisfied that the processes of all or any such Courts can be executed by a smaller number of Peons, it shall be his duty to make a reduction accordingly.

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G. G. MORRIS.

REVENUE CIRCULARS.

REVENUE CIRCULAR ORDERS.

: DECEMBER, 1873.

HON'BLE V. H. SCHALCH.

No. 1.

IN lines 3, 4, and 5, Clause 5, Section V, page 345, Board's Rules, for the words "rate for establishments, travelling allowances, stationery, and postages levied from wards' and attached estates managed by the Revenue Department," substitute the words "the fund for the general management of wards' and attached estates." This change is made under the orders of Government.

No. 2.

WITH reference to paragraphs 28 and 29 of the Instructions for the guidance of Collectors in the acquisition of land for public purposes, District Officers are requested to credit in future the value of revenue abated as compensation for land taken up under Act X of 1870, to "Miscellaneous Land Revenue," and to enter it under a new heading *f*, Table V of Return No. X, immediately after the heading *f* "Sale of Government Estates."

No. 3.

SETTLEMENTS of fisheries, whether the property of Government or otherwise, like settlements of estates consisting of land, should be reported to the Board for confirmation. But the form of report required by Section XII, page 287 of the Board's Rules, in the case of settlements of the latter kind, need not be submitted for the settlement of fisheries. It will be sufficient to shew in the report the number of the fishery mehal on the taujih; the geographical limits of the right; the term of the lease and the rent. The report should also explain briefly the nature of the fishing (*viz.*, the fish caught and the means used to catch

1878 . them), the position of the lessee (*e.g.*, whether he is himself a
 Rev. Cir. fisherman or a speculator who intends to sublet to the actual
 catchers of fish), and the mode of settlement adopted, whether
 by sale to the highest bidder or otherwise.

No. 4.

GOVERNMENT having called for the annual submission, with the Board's Land Revenue Report, of certain information in regard to demand and collection of land revenue, which is not to be obtained in the required form from Return No. X, it has become necessary that an additional Table VI should be submitted with that Return at the close of each financial year.

It should be submitted in the following form:—

1	DESCRIPTION OF REVENUE.	Arrear Demand for 1878-74.	Current Demand for 1878-74.	Total Demand for 1878-74.	Arrear Collections of 1873-74.	Current Collections of 1873-74.	Total Collections of 1873-74.	Remissions granted during the Year.	Balance outstanding at close of Year.
	(a.)—From settled estates bearing revenue in past years. (b.)—From settled estates added to revenue-roll during year of report. (c.)—From settled estates taken off the revenue-roll during the year of report. (d.)—Collections from Government estates. (e.)—Collections from ryotwary tracts. (f.)—From sale of Government estates. (g.)—Miscellaneous land revenue not included in the above.								
	Total								

If the headings (a), (b), (c) and (d) were grouped together, the Return No. X would already furnish the means of constructing this table. But the peculiar classification of estates prescribed necessitates a separate table.

1878
REV. CIR.

No. 5.

A CASE having recently occurred, in which it was discovered, after an estate had been made over to a ward on the attainment of his majority, that a debt was due to the Calcutta Wards' Institution, and difficulty having been experienced in the recovery of this debt, the Member in charge directs that the following rule should be added as Clause 5A, Section III, Chapter XXV (Wards' and Attached Estates) of the Board's Rules at page 342:—

Two months before the date on which any minor, who is being educated at a Government Wards' Institution, will attain his majority, the Collector shall report, through the Commissioner, to the Board of Revenue, the approaching termination of the trust, in order that intimation may be given to the Director of the Wards' Institution, and the necessary steps may be taken to realize any demands on account of the education of the minor.

No. 6.

GOVERNMENT having decided that it is no longer necessary that the Board should countersign Commissioners' contingent bills, the following corrections are made in Section IV, page 176 of the Board's Rules:—

Clause 5, score out the words "Commissioners and"

In Clause 6, line 4, the words "or a Commissioner" should be expunged.

A. MONEY, Esq., C.B.

No. 7.

AFTER the words "to the Board of Revenue" in line 3 of Rule 28 at page 7 of the Salt Manual, add the words "or to the District Collector if authorized to grant the original rowannah."

JANUARY, 1874.

THE HON'BLE V. H. SCHALCH.

No. 1.

THE attention of Commissioners and Collectors is drawn to the Bengal Embankment Act, VI (B.C.) of 1873, which has recently become law.

2. It will be observed that the Act differs from the preceding Acts relating to the same subject, mainly in the following particulars:—

(a.) All public embankments are divided into two classes—(1) those entered in Schedule D, the whole expenses attending which are to be borne by Government, and (2) those not entered in the said schedule. The expenses attaching to the latter, when taken charge of by Government, are to be borne, *not*, as formerly, by the parties bound to maintain them (see Section 11 of Act XXXII of 1855), but by the zemindars of the estates and the proprietors of the tenures which may be benefited or protected by the embankments.

(b.) To carry out that new principle, provisions are made for the due notification to the parties interested of the works proposed to be taken in hand, of the estimated and actual cost thereof, and of the amount of expenses payable by each class, and also for the recovery by Government of the cost from the zemindars, and for the re-imbursement to the zemindars of the proportion payable by the proprietors.

(c.) Provision is made in Part III for immediate action in certain cases of emergency.

(d.) The procedure for the acquisition of land in such cases, and for the determination of compensation for consequent damages is described in Part V of the Act.

1874 . (c.) The Act also contains a new feature in bringing under

REV. CIR. the control of the Collector the management, improvement, and alteration of water-courses in certain cases; and as there is reason to suppose that much of the insalubrity of portions of the country is due to defective drainage, the attention of Collectors is especially drawn to the power for good in this respect now placed in their hands.

No. 2.

Owing to the addition of two columns to Table III of Return No. XXXI, the following alterations should be made in the Test Table for that Return:—

Insert "Test 27A.—Is the entry in column 3. fully explained in the separate sheet?"

To Test 28 should be added the words, "and do the figures represent only the debts which have accrued during Government management?"

Insert "Test 28A.—Are the figures in column 6 the total of those in column 5 of this Return and those in column 6 of the previous year's Return?"

In Test 29 substitute "7" for "5."

In Test 30 substitute "8," "7," and "8" for "6," "5," and "6" respectively.

In Test 31 substitute "9," "10," and "11" for "7," "8," and "9" respectively.

In Test 32, in the first line, substitute "12" for "10."

In Test 32, in the 2nd line, substitute "9," "10," and "11" for "7," "8," and "9" respectively.

In Test 32, in 2nd and 3rd lines, for the words "the entry in column 2," substitute the words "the total of the entries in columns 2 and 4."

In Test 32, in 3rd line, for the figures "4" and "6" substitute "6" and "8" respectively.

No. 3.

It was ruled by the Board in the year 1867 that, under Section 3, Act VIII (B.O.) of 1865, a Collector could not delegate to any of his subordinates the duty of holding sales of

patni tenures. This ruling, however, does not appear to have been circulated for general information, and instances have recently come before the Board where such sales have been, irregularly, conducted by Deputy Collectors. The attention of Collectors is therefore drawn to the necessity for a strict observance of the law in future.

No. 4.

WITH a view to obviate frequent calls for explanation, which the Board now find it necessary to make, District Officers are requested, when submitting the half-yearly report on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII of 1870), prescribed by Circular Order No. 2 of November 1873, invariably to specify the *denomination* of the coins out or broken or withdrawn from circulation.

A. MONEY, Esq., C.B.

No. 5.

DISTRICT Officers are requested to report at once, through the Commissioners of their Divisions, how many stamps, on a rough average, are required to be repunched monthly by the record-keepers of the several Courts at head-quarters and sub-divisions, in accordance with the orders of Government communicated with the Board's Circular Order No. 3 of August 1873; and to state whether any inconvenience is felt in giving effect to those orders.

No. 6.

THE number of joint licenses now issued for the sale of both Country Spirits and Rum, together with the license fees realized, are, under present practice, entered in Returns Nos. XIV and XLII against the heading IIb (Rum), and the revenue from that article is thus shown to be more than it actually is. This system is wrong, and should be rectified.

1874

REV. CIR.

2. The District Officers concerned are therefore requested to enter in their Returns under notice, against the heads of Country Spirits and Rum respectively, a proportionate number of the joint licenses, together with the license fees, regulated by the quantities sold of each sort of spirit. Thus, if ten joint licenses fetch Rs. 100 a month, and the sale of Country Spirits amounts to 800 gallons, and that of Rum to 200 gallons, eight of these licenses should be shown against Country Spirits together with Rs. 80, and the remaining two licenses with Rs. 20 against Rum.

3. The change comes into effect with the Returns for 1873-74. Revised figures for headings Ia and IIb of Returns No. XIV for the quarters ending 30th June and 30th September, should be submitted by the Officers concerned as soon as possible.

4. In Instructions c and f at top of Table I of Returns Nos. XLII and XIV respectively, the words "under heading IIb" should be altered to "agreeably to C. O. No. 1 of January 1874."

No. 7.

BESIDES the information required by Circular Order No. 7 of April 1873, District Officers will, for the future, show separately, in Return No. 31, the amounts that may have been expended during the year from the funds of each ward's or attached estate in the support of (1) charitable dispensaries and (2) schools.

No. 8.

CLAUSES 3, 3A, 6 and 7, Section III, Chapter VIII, page 852 of the Board's Rules, are hereby cancelled, and the following substituted:—

3. Proprietors of estates situated in the districts of Chittagong and Sylhet, and assessed to a Government revenue not exceeding one rupee, and proprietors of holdings in Calcutta, Panchannagram and Chinsurah, may redeem all future payments by one payment of twenty-five times the revenue of such estates or holdings.

FEBRUARY, 1874.

HON'BLE V. H. SCHALCH.

Erratum.

In line 1 of Boards' Circular Order No. 8 of January 1874, for "852" read "152."

No. 1.

THE Government of India, in Financial Resolution No. 3750 of 17th December 1873, having altered the wording of the certificate to be attached to bills for contingent charges, the form of the Wards' Establishment Bill, prescribed in Circular Order No. 9 of November 1873, has been modified.

Indents should be made on the Superintendent of Stationery for the modified form, which should invariably be used in future.

No. 2.

THE following form is prescribed as that in which District Officers should submit the reports on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII of 1870) required by Circular Order No. 2 of November 1873 :—

1				2				3		4		5
Believed to be counterfeit.				Believed to have been reduced in weight otherwise than by reasonable wearing.				Believed to have lost by reasonable wearing more than two per cent. in weight.		Considered unfit for further circulation by reason of obliteration of device, or for other cause.		REMARKS.
Rupces.	Half Rupces.	Quarter Rupces.	Two-anna Pieces.	Rupces.	Half Rupces.	Quarter Rupces.	Two-anna Pieces.	Rupces.	Half Rupces.	Quarter Rupces.	Two-anna Pieces.	

1874

No. 3.

REV. CIR.

CIRCULAR Order No. 5 of October 1873 directed that remissions entered in Return No. X should be classed under the two heads: (1) remissions of right, and (2) remissions of grace. But it has in practice been found that many cases classed as cases of remission do not properly fall under either of these heads. The most common instance is where a farm of some Government estate expires, and the estate coming under khass management, it is found to be uncultivated. The revenue paid by the farmer continues to appear as the demand against the estate, but has of course to be "remitted." Here, as the demand was never due from any one, the so-called remission cannot be treated as either "of right" or "of grace." Again, remissions are sometimes necessary owing to errors in account, revenue paid twice over, and the like. The Member in charge desires, therefore, that except when a remission represents a specific sum at one time really due from a specific person, but which, for good cause and under competent authority, it has been determined to forego, such remission should be classed under a third head, and appear as a "nominal remission."

A. MONEY, ESQ., C.B.

No. 4.

IN continuation of the Board's Circular Orders marginally*

* No. 8 of August 1873.

" 8 of October "

cited, the following orders of the Government of India, in the Financial Department, No. 831, dated 31st January 1874, are published for information and guidance:—

It has been brought to the notice of Government that the provisions of Section 30 of the Court Fees Act VII of 1870, regarding the cancellation of stamps, are not in all cases strictly observed, and that consequently stamps are liable to be fraudulently used a second time.

2. It is therefore requested that, with the permission of His Honor the Lieutenant-Governor, you will be good enough to

impress, upon all Courts and officers having to deal with Court fee stamps, the importance of punching out from the stamps the figure head and destroying the piece, before taking action upon the documents to which the stamps may be attached.

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REV. CIR.

3. The Member in charge desires that each District Officer will at once communicate the present Government orders direct to every one of his subordinate officers, who receives petitions or other paper bearing a Court fee stamp, reporting to the Commissioner of the Division, in due course, that this has been done. The personal responsibility of the officer who gives any order, to see that the stamp affixed under Act VII of 1870 is punched *before* he takes such action, is clear from Section 30 of the Act, and must be enforced.

MARCH 1874.

HON'BLE V. H. SCHALCH.

No. 1.

DISTRICT Officers are requested, when submitting, in accordance with Clause 1, Section XII, Chapter XX, page 287 of the Board's Rules, Abstract Statement No. 20, to shew in Column 2 of Table B., in red ink, the rate per acre of each denomination of soil entered in Column 1 of that Table in addition to the rate per beegha.

No. 2.

THE following alteration has been made in Clause 12, Section I, Chapter XXV, page 341, Board's Rules—

After the words "in value" in the sixth line, substitute for the rest of the Clause the following sentence—"in which case "Collectors should consider the possibility of converting the "securities into a book debt in the Bank of Bengal in accordance "with the Notification of the Government of India, Financial "Department, No. 44, dated 10th January 1867, published at "page 39 of the *Gazette of India* for that year."

No. 3.

CLAUSE 4, Section VIII, Chapter XX, page 282 of the Board's Rules, having been cancelled by para. 8 of the revised orders No. 36A., dated 17th January 1874, circulated with letter No. 71A., dated 6th February last, the words in the latter part of Circular Order No. 3 of May 1872, as noted on the margin, should be expunged.

"and that arrangements for
"its payment at future settle-
"ments should continue to be
"effected, at any rate, until
"the Road Cess Act is in full
"operation."

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No. 4.

It has been brought to the notice of the Member in charge that in many cases the provisions of the law in regard to the institution and defence of suits on behalf of estates under the superintendence of the Courts of Wards are not observed with sufficient care. Mr. Schalch, therefore, desires to draw the particular attention of District Officers to Part X of Act IV (B.C.), 1870.

Section 72 of that Act requires that every suit (except suits in the High Court), brought on behalf of a ward, shall be authorised by some order of the Court in charge of such ward. An injunction to this effect is reiterated in Clause 13, Section I, Chapter XXV (page 341) of the Board's Rules. A copy of the order should invariably be sent with the draft plaint to the Legal Remembrancer.

Again, under Section 69 of the Act, the ward must (except in suits before the High Court) sue or be sued in his own name describing himself, or being described, as a ward of Court; and, as a rule, the manager must be named as next friend. Accordingly, the following form should be adopted in plaints on behalf of a ward of Court—

“A. B., ward of the Court of Wards,
inhabitant of , by C. D.,
inhabitant of , manager of
the estate of the said ward of Court, sues E. F., &c.”

Similarly, in cases where the ward is defendant, the answer should be in the following form—

“A. B., inhabitant of ,
sues C. D., inhabitant of ,
ward of the Court of Wards,
of whom E. F., inhabitant of ,
the manager of the estate of the said ward, is next friend”
or “guardian.”

A. MONEY, Esq., C.B.

No. 5.

THE following orders of the Government of India, in the Financial Department, No. 661, dated 29th January 1874, are

published for information and guidance by order of the Lieutenant-Governor of Bengal—

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REV. CIL.

“The Governor-General in Council is pleased to allow the several Local Governments and Administrations to authorise, whenever they think necessary, District Officers to charge in the accounts the value of the service postage stamps purchased by them, in the fixed proportion of three-fourths to the Revenue, and one-fourth to the Judicial, Departments. Whenever the cost of an establishment is divided between two heads, the charge for service postage labels may be divided in the same proportion, care being taken to secure every possible economy.”

HON'BLE V. H. SCHALCH.

No. 6.

As some doubt appears to exist what estates should be included in the Report on Wards' Estates prescribed by Board's Circular No. 2 of June 1873, the nature of which was further explained in the Circular* to Commissioners, dated 1st September following,

* (To Orissa), No. 208, A. it is hereby directed that such Reports
(To others), No. 699, A. should embrace all estates managed by the Court of Wards, all estates managed by the Revenue Authorities under orders of the Civil Court passed in accordance with the provisions of Acts XXXV and XL of 1858, all estates attached under orders of the Civil or Criminal Courts or under general or special orders of Government, and all estates held in trust by Government.

No. 7.

As it is unnecessary to preserve petitions for sales under Regulation VIII of 1819, which are struck off on payment of the zemindar's demand, the following should be inserted in the Appendix to Chapter XIII (Division III) page 213 of the Board's Rules—

After the words “all petitions” add “(excepting those for sales under Regulation VIII of 1819, which are struck off on payment of the zemindar's demand, which should be placed under class c).”

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REV. CH.

No. 8.

"SALE proceeds of waste papers" from the Collector's office form a part of "Miscellaneous Land Revenue" as laid down in Clause 5, Section VII, Chapter XIII, page 212 of the Board's Rules; and District Officers are informed that, in future, this item of revenue should be shewn under heading (k) Table V of Return No. X.

Note 3 at foot of Table V is cancelled, but it should be remembered that, under the heading (k), there should only be shewn items which are admittedly items of miscellaneous *land-revenue*, and which do not fall under any of the preceding headings; and that the nature of these items must be explained in Table IV.

A. MONEY, ESQ., C.B.

No. 9.

THE following should be added as Clause 2 to Rule 29 at page 7 of the Salt Manual—

At places situated at a long distance from the Collectorate or the Sub-divisional office, the Collector is further empowered to entrust the distribution of the forms, duly signed and sealed, to the Police in charge of the Division within the limits of which the salt is stored at the time for sale.

No. 10.

UNDER the orders of Government, para. 28 of the Instructions for the Administration of the Land Acquisition Act, X of 1870, is hereby cancelled.

APRIL, 1874.

THE HON'BLE V. H. SCHALCH.

No. 1.

THE Member in charge has noticed that, in some cases, para. 9 of the revised settlement rules, circulated with Board's order No. 419 B, dated 24th July 1872, has not been strictly observed, and that, when estates are resettled, the acceptance of the revised assessment is allowed to stand over until the settlement holder signs the final agreement. Mr. Schalch, therefore, draws attention to the rule, and requests that when an estate is resettled steps may at once be taken to secure the execution of the agreement, with the proviso for subsequent revision prescribed in the rule just cited. Any delay on the part of persons with whom settlement has been concluded to sign such agreement, should be reported for the orders of the Board.

No. 2.

THE words "that they are the heirs of parties so registered," at the end of clause 5, Section VII, Chapter XIX, page 268 of the Board's Rules, are hereby expunged.

No. 3.

THE Member in charge has lately had occasion to notice that the data on which rates are fixed are very inadequately set forth in settlement reports. In some cases it has even been thought sufficient to justify the rates proposed by a comparison of their *average* incidence with the *average* incidence of rates for all classes of lands in adjoining estates or villages. No guide could be more fallacious than this. Mr. Schalch, therefore,

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draws particular attention to clause 2, Section V, Chapter XX, of the Board's Rules (page 277), and requests that, in all future settlements, care may be taken to record fully the data on which the proposed rate for *each class* of land is calculated.

No. 4.

THE following is added as Clause 3A, Section XII, Chapter VIII, page 155, Board's Rules—

Covers containing transfer receipts on account of the payment of land revenue should only be forwarded at the public expense when the payment is made in a district other than that to which it belongs for the convenience of Government, but where the payment is so made for the convenience of the payers, postage on the covers forwarding the transfer receipts must either be paid by them, or they should be required to forward them direct at their own cost.

A. MONEY, Esq., C.B.

No. 5.

OFFICERS in charge of Districts where a fee for opium licenses is now levied, are requested to make the following alterations:—

1st.—In Excise Form 26, pages 97 and 98, Board's Rules, for last para. of Clause XII, substitute "XIII. That he pay to Government a fee of Rs. . . ."

2nd.—In Register No. 82, page 226 Board's Rules, add a column (6) with the heading "Amount of License Fee."

No. 2.

1874
REV. CIR.

THE following extract from a recent order of Government is published for the information and guidance of District Officers in charge of estates under the management of the Court of Wards:—

“Until further orders, the surplus cash of and (Wards) estates in general are, as they accrue, to be invested in Government securities, and not at all in the purchase of additional estates.”

No. 3.

As it is desirable to preserve “Kharcha hisabs” of estates, the property of private individuals, held under Khas tehsil; the following addition is made to heading V (b), Class A in the Appendix to Chapter XIII (page 213) of the Board’s Rules:—

“and ‘Kharcha hisabs’ of estates the property of individuals under Khas tehsil.”

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ACT OF STATE—*Jurisdiction—Forfeiture—Confiscation—Circular Orders—*24 & 25 Vict., c. 67 (*Indian Councils Act, 1861*).] The status of the King of Delhi was that of a king recognized by the British Government; and the confiscation of his territories in 1857 was an act of State, and not an act done under color of any legal right of which a Municipal Court could take cognizance. His tenure of the territories assigned him by the Government was a tenure merely *durante regno*, and no power was conferred upon him of creating incumbrances which would survive his deposition.

The word "confiscation" does not necessarily import that the appropriation is to be made as a penalty for a crime, nor when used in that sense does it necessarily imply that the forfeiture has accrued upon conviction, but it may also be properly used as applicable to appropriations of property by Government as an act of State.

The Circular Orders, as to the liability of Government for debts of rebels, issued by the Judicial Commissioners of the Punjab, were not laws within the meaning of 24 & 25 Vict., c. 67

RAJA SALIGRAM v. THE SECRETARY OF STATE FOR INDIA
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Resumption — Seizure — Evidence—Lost Sanad.] Where lands were held by a *jagirdar* under the sovereign of an independent State on a *jaidad* tenure, i.e., on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the sovereign, and on the conquest of the State by the East India Company, the *jagirdar* remained in the same position to the Company, *Held* that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the *jagirdar*, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the *jagirdar* against the Government for the possession of the land, and for the value of the arms and stores. This was so, although, at the time of the resumption, the Regulation law was not introduced into the territories in which the *jagir* was comprised.

Where an alleged original *sanad* was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient *sanads* by Regulations II of 1819, s. 28, and XIV of 1825, s. 3, and taking all the circumstances into consideration, refused to consider the title under it established.

Where the evidence showed that the arms and stores seized, had been purchased by the *jagirdar* before the resumption, and there was no authority or evidence to show that those who held by *jaidad* were not entitled to things so purchased, *Held* that the representatives of the *jagirdar* were entitled to recover the value of the arms and stores so seized.

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—, s. 198 ... App. 8

See *SPECIAL APPEAL, ADMISSION OF, AFTER PRESCRIBED PERIOD*.

—, s. 203 ... 287

See *SUCCESSION ACT, s. 282*.

—, ss. 210, 211, 246—*Execution of Decree—Claim by Personal Representative of Judgment-debtor—Appeal—Act XXIII of 1861, s. 11—Parties to Suit*.] Where it was sought to execute a decree, obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the personal representative of the deceased judgment-debtor, and such personal representative claimed to hold the property not in her representative character, but in her own right, *Held*, that her claim was not a claim under s. 246, Act VIII of 1859, but that the case came under ss. 210 and 211. It was a matter between the parties to the suit relating to the execution of the decree, and as such, was, under s. 11, Act XXIII of 1861, to be determined by the Court executing the decree, and not to form the subject of a regular suit. The order rejecting the claim was therefore open to appeal.

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— XI, s. 5— <i>Attachment—Revenue Sale.</i> Act XI of	
1859 is, to a great extent, a remedial Act passed for the benefit of	
the subject, and in order to relax the stringency of former Statutes,	
whereby the Crown was empowered to sell estates for non-payment	
of revenue.	
S. 5 of the said Act applies to estates which are under attach-	
ment issued under Act VIII of 1859, and which are in the hands	
of a manager appointed on the application of the judgment-debtor	
for the purpose of liquidating the debts. Such attachments are	
not superseded by the appointment of such manager.	
The words “arrears of estates under attachment” apply to cases	
where a portion only of an estate is under attachment, as well as	
to cases in which the whole estate has been attached.	
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No appeal lies to the High Court from an order passed by a District Judge, issuing a precept to the Collector to hold an estate in attachment, and to appoint a manager under s. 26, Regulation V of 1812, and s. 3, Regulation V of 1827.	
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ARBITRATION— <i>Agreement to refer—Refusal of Arbitrator to act—Act VIII of 1859, ss. 319 & 326.</i>	
Where parties had executed a deed, agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court.	
BROOKE v. SUDIAL	App. 13
——— <i>Award, Judgment according to—Act VIII of 1859, ss. 324 & 325—Appeal.</i>	
A suit in the Munsif's Court was, after issues had been settled and evidence on such issues adduced by both parties, referred by consent of parties to arbitration. The arbitrator made his award, and on the next day an order was recorded by the Munsif that the parties were to file their objections to the award in one day, notwithstanding that s. 324, Act VIII of 1859, allows the parties ten days for such purpose. The plaintiffs, in accordance with that order, filed a petition of objection to the award, and an order was endorsed by the Munsif on this petition, that it should be laid before the Court with the papers of the arbitrator. The Munsif then gave his judgment in which he went into the evidence, and, overruling the objection of the plaintiffs, gave a decision on the merits, which decision was in accordance with the award:	
<i>Held</i> , that such judgment, though in accordance with the award, was not final under s. 325 of Act VIII of 1859, but was open to appeal.	
In order to make it final, it should appear that all the proceedings have been regular, and the directions of Act VIII of 1859 complied with.	
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REFERENCE TO— <i>Powers of Appellate Court—Act VIII of 1859, ss. 312 & 313—Act XXIII of 1861, s. 37.</i> An Appellate Court has no power, even by consent of parties, to refer a case to arbitration under the arbitration sections of Act VIII of 1859, which apply only to Courts of original jurisdiction; nor is such power conferred on an Appellate Court by s. 37, Act XXIII of 1861.	
JUGHSSUR DUTY v. KRITARTHO MOYEN DOSSEN	266
Delay in making Award.]	
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ARBITRATOR REFUSING TO ACT	App. 13
<i>See ARBITRATION.</i>	
ARMENIAN WILLS—Construction—Devise—Absolute Estate— <i>Estate for Life</i> .] An Armenian by his will in the Bengali language made a gift to his son in the following terms:—"I bequeath to A as <i>salamati</i> my talooks (which he named) and Rs. 6,000 in cash. He shall enjoy the profits of the aforesaid talooks. On his demise his sons shall get. The moqtars shall make over to the satisfaction of A." <i>Held</i> , that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. A took an absolute estate under the devise.	
BROUGHTON v. POGOSH	74
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BANK OF BENGAL v. NEWTON	App. 1
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IN EXECUTION, ALIENATION PENDING.]

Certain property was attached in execution of a decree, and while the attachment was in force pottas were granted to certain persons by the judgment-debtors. Twelve years after the attachment, no further steps having been taken in the matter, the execution case was struck off the file, and the property was afterwards mortgaged by the judgment-debtors to R. Subsequently a fresh attachment was issued at the instance of the heirs of the former attaching-creditor, under which the property was put up for sale subject to R's mortgage, and R herself became the purchaser. In a suit by R to set aside the pottas granted during the continuance of the first attachment,—*Held* that the prohibition against alienation of property under attachment avoids such alienation only as against the execution-creditor or persons entitled to claim under him.

A conveyance executed by the judgment-debtor after an attachment has been removed, and before a fresh attachment is issued, is valid, though the second attachment is under the same execution as the first.

Quere.—Whether an alienation of property under attachment void as against the execution-creditor becomes valid by relation when the attachment is removed?

Semle.—It may be presumed that an execution long neglected, and finally struck off, has ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain.

PUDDOMONER DOSSHEE v. ROY MUTHOORANATH CHOWDREY	...	411
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————, s. 108, Excep. 1—*Possession of Goods by Person other than Owner—Title conveyed by Vendor to Vendee.*] The plaintiff let to *D* a piano on hire on the following terms:—"At Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer." These terms were embodied in a voucher which was signed by *D*. The monthly hire was not regularly paid, and the plaintiff sued for and obtained a decree for a portion of the hire up to May 1873. Subsequently, in that month, *D* sold the piano to the defendant, who obtained delivery of it in June. In a suit by the plaintiff in trover for conversion of the piano, the Judge found that the defendant acted in good faith.

Held, that the possession acquired by *D* was not possession by consent of the owner within the meaning of s. 108 of Act IX of 1872, excep. 1, and that he did not by sale to the defendant transfer the ownership in the piano to him. Excep. 1 of s. 108 does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose.

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INDROMONEN BURMONEN v. SUGOOPCHUNDER PAUL ... 291 note
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BHYRUB MUNDUL v. GUNGARAM BONNERJEE ... 290 note

————— *Objection taken for first Time on Special Appeal.*]

NANOO ROY v. JHOOMUCK LOLL DOSS ... 292 note

—————.] One of three co-sharers of certain property, the rent of which was paid by the tenant to a person acting as agent of the

co-sharers, from whom they received it in proportion to their respective shares, brought a suit against the tenant for her share of the rent of which she alleged her co-sharers were colluding with the tenant to deprive her. To this suit she made her co-sharers defendants. The defendants alleged that she had not received, and was not entitled to receive, the rent from the tenant, but the lower Courts found these facts in her favor, and gave her a decree. It was objected on special appeal that the suit would not lie, inasmuch as the plaintiff being one of several co-sharers was not competent to sue alone for her share of the rent. *Held*, that, under the circumstances, and the co-sharers having been made defendants, the suit was maintainable.

DOORGA CHURN SURMA v. JAMPA DASSEN ... 289

CO-SHARERS—*Suit by one to set aside Rent Sale—Cause of Action—*

Valuation—Jurisdiction—Parties.] Where a patni talook, belonging to several co-sharers, each of whom collected his own share of rent from the melal, was sold for arrears of rent, and one of the co-sharers brought a suit in the Munsif's Court to recover possession of his share by setting aside the sale, and valued his suit according to his share, making the other co-sharers defendants,—*Held* that the suit could not be maintained in that form. The cause of action was the sale of the whole estate, and the suit should have been framed and valued accordingly, and brought in a Court in which the rights of all the parties interested in setting aside the sale might have been declared in one suit.

UNNODA PRASAD ROY v. ERSKINE ... 370

Unauthorized Alteration of Joint Property by one of several.]

DWARKANATH BHOOTIA v. GOOPHENATH BHOOTIA ... 189 note
HOLLOWAY v. SHEIKH WAHED ALI ... 191 note

Injunction.] One of several co-sharers of joint undivided property has no right to erect a building on land which forms a portion of such property, so as to materially alter the condition thereof, without the consent of his co-sharers.

SHEOPERSAD SINGH v. LEBLA SINGH ... 188

One of several co-sharers of joint undivided property has no right to take exclusive possession and alter the condition of any portion of the joint property without the consent of his co-sharers, and the Court will grant an injunction to restrain him from doing so.

STALKARTT v. GOPAL PANDAY ... 197

COSTS, ATTORNEY'S LIEN FOR—*Compromise by Parties—Col-*

lusion.] Where the parties to a suit came to a compromise between themselves without the knowledge of the plaintiff's attorney, when the suit was at such a stage that it did not appear that the plaintiff was entitled to recover anything, and there was no proof that he was to receive anything from the defendant on the compromise, or that the compromise was not a *bonâ fide* one,—*Held*, the plaintiff's attorney was not entitled to have the compromise set aside on the ground that he might thereby be deprived of his costs.

A clear case of fraud and collusion must be made out to entitle the attorney to the interference of the Court.

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COURT FEES ACT (VII of 1870), ss. 6 & 12— <i>Valuation of Suit—Jurisdiction.</i>	
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.....] For the purpose of determining the question of jurisdiction, the valuation of a suit should be computed according to the market-value of the subject-matter of the suit, and not by the special rules applicable to valuation laid down in Act VII of 1870.	
NANHOON SINGH v. TOFANEH SINGH ...	118
....., SCHED. I, No. 11—<i>Appointment by Will.</i> Where a person having a life-interest in a fund with a general and absolute power of appointment thereover exercises such power by will, no <i>ad valorem</i> fee is payable in respect of such fund under the Court Fees Act.	
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DERIVATIVE EXECUTOR— <i>Succession Act (X of 1865).</i> Under the Indian Succession Act, the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866.	
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Ryoti Kadimi Tenure—Potta, Acceptance of—Regulation VIII of 1793, s. 51—Regulation V of 1812, s. 10—Service of Notice of Enhancement—Landlord and Tenant. Where a zemindar, a purchaser from a mortgagee, sued to enhance the rent of lands (part of the purchased zemindari) held on a *ryoti kadimi* tenure, which had existed more than twelve years before the decennial settlement, but the holder of which had subsequently accepted a potta from the zemindar,—*Held*, the acceptance of such potta did not debar the tenant from the right of exemption from enhancement to which he was entitled by reason of the nature of his tenure. Such a potta may be confirmatory only, and is not inconsistent with the presumption that a prior title existed.

Semble.—A claim to exempt a tenure from enhancement, on the ground that it is a *ryoti kadimi* tenure, does not fall within Regulation VIII of 1793, s. 51.

Where substituted service is resorted to under Regulation V of 1812, s. 10, the Courts should take care to be first satisfied that the person who ought to be served personally is keeping out of the way.

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Attachment by Mortgagee—Act VIII of 1859, s. 271.

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—.] Pending a suit against A and N upon a bill of exchange, A deposited with the plaintiff as security for the amount due upon the bill the title deeds of property belonging jointly to N and himself. The plaintiff subsequently got a decree for the amount due upon the bill. Thereafter one S, in execution of a decree against A and N, attached certain property of theirs, including the mortgaged property, and caused it to be sold; and the surplus sale proceeds, after satisfaction of S's decree, were paid into Court to the credit of his suit. Intermediately between this attachment and sale, the plaintiff also attached under his decree on the bill of exchange the mortgaged and other property

of *A* and *N*, and after the plaintiff's attachment *N* ratified the equitable mortgage made by *A*. The sale under *S*'s attachment having taken place, the plaintiff sued *A* and *N* and the purchasers at such sale of the mortgaged property for foreclosure or sale thereof, and obtained a decree declaring that he had a good equitable mortgage of *A*'s share in the joint property, and for an account and sale in default of payment; and the plaintiff subsequently, on 26th May 1873, got an order under his decree upon the bill of exchange for payment to him of the surplus sale proceeds lodged in Court to the credit of *S*'s suit, and for sale of certain of the properties, other than the mortgaged property, which he had attached. Under this order the money was paid out to the plaintiff, and the properties were advertized for sale. Macpherson, J., having on an application by *A*, set aside this order, and directed that the plaintiff should refund into Court the money paid out to him, and that the sale should be stayed, the Court on appeal refused to set aside the order of the 26th May, but made the plaintiff undertake to pay into Court the mortgage-money with interest if the same should be received by him from the defendants in the mortgage suit.

THE BANK OF BENGAL v. NUNDOLALL DOSS

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EXECUTION OF DECREE—*Joint and Several Liability—Limitation—Proceeding to enforce Decree—Act XIV of 1859, s. 20.* On 29th November 1861, *A* obtained a decree against *B*, *C*, *D*, and others in the following terms:—that "the suit be decreed with mesne profits as far as they can be ascertained to be charged upon all the defendants jointly and severally; the costs of the plaintiff to be paid by the defendants, and each of the defendants to pay his or her own costs." On 6th October 1866, *C* instituted a suit against *A* to have the sale of certain mauzas, which had taken place in execution of *A*'s decree, set aside. This suit was decided by the High Court in favor of *C*, and the decision was confirmed by the Privy Council on 14th June 1872. In the meanwhile *A* proceeded to execute his decree as against *B* and *D*; *D* objected; the lower Court allowed her objections, and the High Court on appeal, on 12th December 1866, affirmed that decision. The lower Court allowed *A* to proceed to execute his decree as against *B*, and on 2nd June 1866, certain property belonging to *B* was sold in execution of *A*'s decree and purchased by *A*. On 8th August 1866, the Court duly confirmed the sale, and ordered the suit to be struck off the file. On 5th July 1869, *A*, stating that there was still a sum of money due to him under the decree of 29th November 1861, made an application praying that the suit might be restored to the file, and that the rights of *B* in certain property might be put up for sale. Upon a remand the lower Court refused to grant *A*'s application on the ground that it was barred by limitation.

Held, that *A*'s application was not barred, inasmuch as the confirmation of the sale by the Court on 8th August 1866 was a proceeding within the meaning of s. 20, Act XIV of 1859, and sufficient to keep *A*'s decree in force.

Held also that *A*'s decree being a joint one, he was entitled to execute it against any of the defendants he might select.

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Process against one of joint Judgment-debtors.]

SREENATH GHOSH v. SAHIB RAM ROY

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EXECUTION OF DECREE, SUIT FOR PROPERTY TAKEN	
IN— <i>Right of Action—Act XXIII of 1861, s. 11.</i>] Where a party who has obtained a decree for land takes possession by his own act, and not by the act of the officer of Court, of more land than the decree gives him, <i>Held</i> , that a suit will lie to recover back possession of any land taken in excess of the decree.	
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GOODS SOLD AND DELIVERED, ACTION FOR— <i>Principal and Agent—Adoption of Agent's Act—Delivery by, and payment to, unauthorized Agent.</i>] The defendant, through a broker, purchased from the plaintiffs certain goods, to be paid for by cash on delivery, and before removal. Both the defendant and his broker knew that the plaintiffs had a separate cash office where payments for goods of the description purchased were usually made, and the broker knew that the delivery clerk, whose duty it was to deliver the goods, had no authority to do so without a special order from the plaintiffs. A portion of the goods was paid for at the cash office, and delivery thereof obtained from the delivery clerk in the usual way. For the remainder of the goods, the broker, on behalf, but without the knowledge, of the defendant, paid the delivery clerk and obtained delivery from him of the goods without any order for delivery having been given by the plaintiffs. The plaintiffs, a year subsequently, discovered that the delivery clerk had embezzled the money so paid to him. <i>Held</i> , that they were entitled to recover the balance of the price of the goods from the defendant in an action for goods sold and delivered.	
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HINDU LAW—Joint Family—Separate Acquisition—Presumption—*Onus Probandi*.] The presumption of Hindu law that any property acquired during the time a Hindu family remains joint belongs to all the members of the joint family, does not take away the onus which lies on the plaintiff in a suit to recover a share of the property of proving his case; it merely aids him in proving it. Such presumption is liable to be rebutted by means other than inquiring as to the source from which the purchase-money of the property was derived. That criterion, though the most satisfactory, is not indispensable.

Evidence that the property claimed to be joint was purchased in the name of one member only, that after the purchase the members separated, and each member carried on business separately, and that the property was thence forward in the exclusive possession, and used for the business, of the member in whose name it had been purchased, is evidence sufficient to rebut the presumption that the property was joint.

BHOLANATH MAHTA v. AJOODHIA PERSAD SOOKUL

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Misrepresentation—Act VIII of 1859, s. 260.

In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree passed against the estate of *R*, one member of the family, for his separate debt, the defendants sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own; and that while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of *R*, viz., that during *R*'s lifetime the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when *R*, *B* the *kurta*, and a third member of the family, entered into a security-bond with the Collector, whereby *R* pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers."

On the other hand the plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of *R* alone, filed the family account-books and the private account-books of *R* for the same purpose, as well as certain letters which passed between *B* and *R* relative to the purchase of the property.

Held, 1st, that the evidence as to the separate trading, funds, and property of the several members of joint family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon the plaintiff the onus of establishing the joint nature of the property claimed by clear and cogent evidence;

2ndly, that the provisions of s. 260, Act VIII of 1859, apply to ordinary *benami* purchases at execution-sales, but do not affect

purchases of property by one member of a joint Hindu family in his own name, but with the joint funds;

3rdly, that the mere fact that *R*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the defendant, the purchaser at a sale in execution of a decree against *R*, their own share of such estates;

4thly, that the misrepresentation as to his separate ownership made by *R*, in the security-bond given to the Collector, could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the plaintiff, the defendant not having purchased on the faith of such misrepresentation;

5thly, that the letters between *B* and *R*, relative to the purchase by the latter of the estate in dispute, were admissible as against the defendant.

BODH SING DOODHOORIA v. GUNESH CHUNDER SEN ... 317

HINDU LAW—*Joint Family—Separate Acquisition—Presumption—Onus Probandi—Nucleus—Limitation—Act XIV of 1859, s. 1, cl. 13.*] A claim by a member of a joint Hindu family to a share in a family dwelling, on the allegation that the house was originally joint, falls within the provisions of s. 1, cl. 13 of Act XIV of 1859.

Semble.—When property has been purchased by an individual member of a joint Hindu family, the burden of proof is on those who claim it to be joint property to show that there was a nucleus of joint property out of which it could have been purchased.

DEONATH SHAW v. HURRYNARAIN SHAW ... 349

KRISTO CHUNDER KURMOKAR v. RUGHONATH KURMOKAR. 352 note

Impartible Zemindari—Succession—Custom—Evidence.] By the general Hindu law, where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succession as between sons by different wives (other than the first wife) of equal caste, is to be determined by the priority of birth of the sons, and not by the priority of marriage of their respective mothers; and therefore with respect to the succession to an impartible zemindari in the district of Tinnevely in the Presidency of Madras, the son of the third wife is, in the absence of proof of any special custom or family usage to the contrary, to be preferred as heir to a subsequently born son of the second wife.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence.

KANALAKSHMI AMMAL v. SIVANANANTHA PERUMAL SETHU-
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Mitakshara—Ancestral Property—Alienation by Father.] *T S*, a Hindu, who with his son *J N* formed a joint Hindu family subject to the Mitakshara law, executed in favor of *D* a bond, whereby he professed to pledge a share of certain family property as security for the repayment of money advanced to him by *D*. Default being made in payment of the loan when due, *D* brought a suit on the bond against *T S*, and obtained a decree for the amount secured thereby, in execution of which decree he attached and caused to be sold the right, title, and interest of *T S* in certain other family property, not covered by the bond, and

himself became the purchaser thereof, and took exclusive possession of the property. In a suit brought by *J N* against *T S* and *D* to recover possession of the property purchased by *D*, on the ground that no legal necessity existed for the loan,—*Held* that *T S* had no individual right to any portion of the property which he could pass to a third person, and therefore *J N* was entitled to have the alienation set aside, and to recover possession of the property. There being nothing amounting to any voluntary representation by *T S* of his having any right or interest in the property, or any representation of fact made by *T S* in order to induce *D* to advance the money, and nothing to show that there was no other property out of which the decree could be satisfied, no equity arose between *T S* and *D* such as entitled the latter to call on *T S* to divide the property with his son, so as to make the share of *T S* available by *D* to the extent of the loan.

JUGDEEP NARAIN SINGH v. DEENDIAL ... 100

HINDU LAW—Mitakshara—Ancestral Property—Alienation by Father—Partition in Father's Lifetime—Mother's Share.] *A*, the *kurta* of a Hindu family, governed by the Mitakshara law, living with his two sons *B* and *C* in joint enjoyment of the family property, took a loan from certain persons, and executed to them a mortgage by bond on the joint family property. The bond-holders obtained a decree on their bond, in execution of which they caused the property to be sold, and themselves became the purchasers. *C* was a minor at the time of the alienation. In a suit by *B*, on behalf of himself and *C*, to set aside the alienation, on the ground that it had been made without their consent and without legal necessity, the Court found that *B* had taken such a part in the transactions leading to the alienation as made him a consenting party to it; that there was no legal necessity for the alienation; and that *C* being a minor, the alienation was not the joint act of all the members of the family:

Held, that, under these circumstances, the alienation failed to convey to the purchasers either the entirety of the property or any share or interest in it, and *C* was entitled to have it set aside. In ordering the alienation to be set aside, the Court, in the interest of the minor son, and favoring the equity the purchasers clearly had against *A* and *B*, directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of *A* and *B* should be jointly and severally subject to the lien thereon of the purchasers for the repayment of the loan to *A*.

So long as a Hindu family under the Mitakshara law is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, no member of the family has any separate proprietary right therein which he can alienate or encumber. The property can only be alienated by the joint act of all the members express or implied; or, in case of justifiable family necessity, by the *kurta* alone.

Upon a partition of ancestral property between a father and his sons during the lifetime of the father, the mother is, under the Mitakshara law, entitled to a share.

MAHABEER PERSAD v. RAMYAD SINGH ... 90

Partition in Father's Lifetime—Mother's Share.] By the Mitakshara law a son may sue during the lifetime of his father for a partition of the ancestral property. On such a partition being made, the mother

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is entitled to have a share allotted to her, by way of maintenance or otherwise, equal to a son's share.

LALJEE SINGH v. RAJCOOMAR SINGH ... 673

HINDU LAW—*Mithila Law—Alienation—Separate Acquisition.*]

According to *Mithila* law, the owner of self-acquired property has full power of disposition over it.

RAJA BISHEN PERKASH NARAIN SINGH v. BAWA MISSEER ... 430

Partition by Sons—Widow's Share.] On partition of the family property by the sons after their father's death, the mother is entitled to share equal to that of a son.

If she has before the partition received property from the father either by gift or will, amounting to more than a son's share, she is entitled to nothing more on partition: if she has received less, she is entitled on partition to as much as will make what she has received equal to a son's share.

JUDONATH DEY SIRCAR v. BROJONATH DEY SIRCAR ... 385

Widow—Maintenance—Residence—Unchastity.] A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity, or for any other improper purpose.

Arrears of maintenance may be awarded.

RAJA PIETHEE SINGH v. RAMI RAJ COOBER ... 238

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INTEREST, RATE OF — *Penalty—Contract—Act XXVIII of 1852, s. 2—Contract Act (IX of 1872)—Reg. III of 1793, s. 21.*]

The plaintiff advanced money to the defendants on an *ikrar*, by which it was agreed that he was to allow them to draw on him to the extent of Rs. 20,000 within three years, the plaintiff to repay himself by having an *ijara* of the defendants' share in certain property which his loan was to aid them in recovering. A 4-anna share of the profits, after deducting Government revenue and expenses, was to go in payment of interest on the money lent; half of the remaining three-fourths to go towards payment of the principal, and the other half to the defendants. If, at the end of the term, any balance remained due to the plaintiff, the defendants were to pay it with interest at 18 per cent. If the defendants failed to give the *ijara*, they agreed to pay the amount borrowed with interest at $6\frac{1}{2}$ per cent. per mensem. The plaintiff advanced the money and obtained a receipt therefor from the defendants. The defendants failed in giving the plaintiff the *ijara*. In a suit brought to recover the sum lent by the plaintiff with interest, the first Court gave a decree for the plaintiff for the sum claimed with interest at the higher rate stipulated for in the *ikrar*, viz., 75 per cent. On appeal by the defendants to the High Court, the con-

tention was raised, that the high rate of interest amounted to a penalty which the Court would not enforce, and that the contract was unreasonable and oppressive in character. The Judges differed in opinion, BIRCH, J., holding that the contract was inequitable and oppressive, and that, notwithstanding the repeal of the usury laws by Act XXVIII of 1855, the Court was not bound to decree interest at the rate stipulated for by the parties; and MARKBY, J. (whose opinion prevailed), being of opinion that, since the passing of Act XXVIII of 1855, there was no legal restriction on the rate of interest; that the stipulation for interest at 75 per cent. was not a penalty, but an alternative stipulation for interest at a higher rate on the happening of events under which the lender incurred a greater risk, and that the contract should be enforced.

Held (on appeal under cl. 15 of the Letters Patent) that the stipulation in the *ikrar* for interest at 75 per cent. was not in the nature of a penalty, nor was it an alternative stipulation; it was an estimate by the parties of the damages to which the plaintiff would be entitled in the event of a breach of the contract by the defendants in not giving the *ijara*.

Held also that, in the absence of evidence of any fiduciary relation between the parties, of any imposition or misrepresentation on the part of the plaintiff, or any want of capacity on the part of the defendants, and there being nothing in the circumstances which led to the execution of the *ikrar* to show that there was any constructive fraud on the part of the plaintiff, or any undue advantage taken by him, the contract was not one which the Court would set aside as being unreasonable, inequitable, or oppressive in character.

Sembla—The Contract Act (IX of 1872) is not retrospective.

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Holding over after Expiry of Lease—Monthly or Yearly Tenancy—Notice to quit.] A and B let a house and premises in Calcutta to C, under a Bengali lease, for a period of three years, from 1st Asar 1273 (14th June 1866). Upon expiration of the term, C continued in possession of the house, and A and B, after repeatedly calling upon him to deliver up possession, served on him on 18th March 1873, in a letter written by their attorney, a notice to quit "on or before the 1st day of Jaishtha 1280 B.S., corresponding with the 13th day of May next." Held, that C, after the end of his lease, held merely from month to month, and that the tenancy was terminable by a month's notice. Held, further, that the letter of the 18th March 1873, was a sufficient notice.

There is nothing which makes it a necessary inference that a tenancy in Calcutta is a tenancy by the year, in the absence of any special agreement to the contrary. So far as there is any custom in Calcutta, or any inference of fact to be drawn from mere occupation accompanied by payment of a monthly rent, it is that the tenancy is a monthly one.

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SUIT FOR CANCELLATION OF—Forfeiture—Act X of 1859, s. 23, cl. 5, & s. 78.] Where, in a perpetual lease, there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void,—Held, that in a suit under cl. 5, s. 23 of Act of X of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of s. 78, even though the defence set up was false in fact.

DULI CHAND v. MEHER CHAND SAHU ... 439

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—Act XIV of 1859, s. 1, cl. 13—Joint Property, Suit for Share of—Onus Probandi.] A suit to enforce a right to a share of joint family property must be brought within twelve

years from the date of the last payment to the plaintiff, or the person through whom he claims, on account of the share; and the onus is on the plaintiff to show possession of the share, or receipt of a payment on account of it, within twelve years. It is not sufficient for the plaintiff to show that the property was joint family property.

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er.] The plea of limitation can be raised and determined in a suit brought by a landlord against a person who is really a trespasser, but who has set up a false case of tenancy.

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OCCUPANCY RIGHT— <i>Zemindar and Ryot—Transfer by Ryot—Mesne Profits.</i> A right of occupancy, which is not transferable, is merely a right on the part of the person entitled to it, to occupy and till the soil either by himself or by persons dependent on, or subordinate to, him, e.g., his servants, lessees, or licensees. Therefore, where a non-transferable right of occupancy was transferred, and the transferee was in actual possession of the soil, tilling and using it for his own benefit,— <i>Held</i> that the zemindar had a right of suit against the transferee to recover possession of the land.	
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<i>See</i> ACT VIII OF 1859, ss. 210, 211, 246.	
PLAINT— <i>Act VIII of 1859, ss. 26, 29—Titles of Honor.</i> Where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person does not contain "the description of the defendant" in accordance with s. 26 of Act VIII of 1859 if such titles are omitted. In such a case the plaintiff should, on the objection being taken by the defendant, be ordered to amend the plaint; and if such order is not complied with, the plaint should be rejected.	
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<i>Signature and Verification by one Partner of a Firm—Act VIII of 1859, s. 27—Act XIV of 1870—Practice.</i> By the practice of this Court, in a suit brought by a firm, one partner can, without having obtained special leave, verify the plaint on his own behalf and also on behalf of his co-partners.	
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PREScription— <i>Light and Air—User—Acquiescence.</i> The law of prescription applicable to India is the English law previous to the passing of the Prescription Act, 2 & 3 Will. IV, c. 71. In order to establish a right to light and air, an uninterrupted user of at least twenty years, with the acquiescence of the owner of the servient tenement, must be shown.	

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In a suit to restrain the defendants from obstructing the light and air through certain windows of a house belonging to the plaintiffs, it was shown that the enjoyment of the right began on 14th April 1850, the windows then being in a sufficiently finished state to create the right. In March 1870 the plaintiffs received notice from the defendants of their intention to erect a building which would have the effect of obstructing the passage of light and air through the plaintiffs' windows. The building was actually commenced on 23rd March 1870, but it was not actually raised to such a height as to amount to an obstruction until some days after the twenty years had elapsed. *Held*, that there was not an enjoyment for twenty years with the acquiescence of the defendants such as entitled the plaintiffs to maintain the suit.

Quære.—Whether proof of constructive knowledge on the part of the defendants would not be sufficient to show their acquiescence?

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PROMISSORY NOTE PAYABLE BY INSTALMENTS—Cause of Action—Act IX of 1850, s. 34—Act VIII of 1859, s. 7.]				
When two or more instalments of a promissory note, payable on the face of it by instalments, are due, the holder of the note is not at liberty to sue separately for each instalment, or for some of them; he must sue for all the instalments due in one action. A judgment recovered in a suit for one instalment when others are due is a bar to a suit subsequently brought for the latter.				
MACKINTOSH v. GILL	...	...	...	37
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The decision of a Small Cause Court rejecting an application for a new trial, but making such rejection contingent upon the opinion of the High Court, is not such a judgment as can be referred under s. 7, Act XXVI of 1864.				
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RES JUDICATA—Act VIII of 1859, s. 2—*Cause of Action—Ancestral Property.*] *C*, a Hindu, subject to the Mitakshara law, adopted *S* and afterwards *B*, and made a will, whereby, after providing for his widow, the family worship, &c., he made a division of his real and personal property between his two adopted sons. Provision was also made for forfeiture by either of the sons in case they disputed the will, in which event the whole estate was to go to the other son. This will was registered and filed in the Collector's Court. *S* was subsequently disowned by *C*, and declared to have forfeited his right to anything under the will. In 1859, *S* brought a suit against *C*, *B*, and certain persons who claimed portions of the property under deeds executed by *C*, to cancel those deeds, to cancel the will, to set aside the adoption of *B*, and for maintenance. In this suit he alleged that *C* had no power to make any of the devises of real estate contained in the will, inasmuch as the whole estate, consisting of property inherited by *C* and property acquired by him from the income of such inherited property, was ancestral. The only issue raised in that suit referring to the will was whether it was assented to by *S*. The first Court found that it had been so assented to; that the adoption of *B* was valid; and that *S*'s conduct justified *C* in disinheriting him: the suit was accordingly dismissed. *S* appealed to the High Court, and in his grounds of appeal raised the same contention as before, *viz.*, that the whole of the real property was ancestral, and therefore *C* had no power to dispose of it without his consent. The High Court, in 1863, varied the decree of the first Court, and held that the will must be set aside so far as it affected the right of *S* in the unces-

tral property, but that the ancestral property only included that inherited, and not that acquired by *C* with the income of the inherited property. In a suit brought by *S*, after the death of *B* and *C*, against *B*'s widow and the parties to the former suit, or their representatives, to obtain possession of the whole estate of *C* on the ground that both the inherited property and the property acquired from the income thereof were ancestral.

Held (reversing the decision of the High Court) that, although the issue as to the assent of *S* to the will clearly embraced only a portion of the controversy between the parties, the Court had jurisdiction, and indeed was bound, to decide whether or not the will was operative as to all or to any and what portion of the property, and that its decision on that point was binding on the parties.

According to the general law relating to *res judicata*, where a question has been necessarily decided in effect, though not in express terms between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form.

S. 2, Act VIII of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action.

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RES JUDICATA—Act VIII of 1859, s. 14—*Jurisdiction*—*Suit for Land*.] A brought a suit in the Court of *S* against *B* for certain land as being an accretion to his estate in the district of *S*. *B* claimed it as being part of his estate in the district of *G*, to which district he alleged the land had in a former decision been found to belong. The Court of *S* held that the land was an accretion to *A*'s estate in the district of *S*. In a subsequent suit brought by *B* in the Court of *G* against *A* for the land to which the subject of the former suit had been found to belong, *Held*, that the holding in the former suit necessarily decided that the land claimed by *B* was in the district of *S*, and that the Court of *G*, under Act VIII of 1859, s. 14, had no jurisdiction.

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BAHADUR ...

Deed of Gift—Fraud.] A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.

Quare.—Whether a donor can avoid his own deed on the ground of his own fraud?

RAMANUGRA NARAIN v. MAHASUNDUR KUNWAR ... 433

Enhancement of Rent—Declaratory Decrees.] Where, in a suit for enhancement of rent, the plaintiff failed to prove notice of enhancement, but the Court enquired into, and gave a declaratory decree as to, his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of the rent of the same tenure founded on a valid notice.

NUFFRECHUNDR PAUL CHOWDREY v. POULSON ... 53

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REVENUE SALE—Zemindari—Onus Probandi—Julkurs—Appeal, Objection on.] An auction-purchaser at a revenue sale of a permanently-settled estate is remitted to all the rights possessed by the original settlor at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders; the presumption in favor of a purchaser resting upon the principle that every biga of land sold must contribute to the public revenue, unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession.

In a suit by an auction-purchaser of a permanently settled estate to recover certain *julkurs* of which the defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the permanent settlement, it was held that the onus was on the plaintiff to prove his title affirmatively.

The Judicial Committee refused to entertain an objection taken in the grounds of appeal, which had not been taken on appeal to the High Court.

Julkur, or the right of fishery, may exist in India as an incorporeal hereditament, and as a right to be exercised upon the land of another.

FORBES v. MEEH MAHOMED HOSSEIN ...

REVISION—Criminal Procedure Code (Act X of 1872), ss. 283, 286, 294, & 297—Power of High Court—"Material Error"—Privileged Communications.] Where the High Court sent for the record of a case, and it appeared therefrom doubtful whether the evidence was sufficient to support the conviction, the Court refused to interfere, there being no material error in law, or in the proceedings which rendered such conviction illegal and improper.

Per GLOVER, J.—The power of the High Court under s. 294 of Act X of 1872 is limited to sentences and orders passed by subordinate Courts, as distinct from judgments of such Courts, and a judgment cannot be interfered with (except in cases where the law gives an appeal on the facts), unless it be shown that it is contrary to law.

Per PONTIER, J.—The High Court cannot, under s. 294 of Act X of 1872, interfere with a conviction, unless there has been some material error of law which renders such conviction illegal and improper in law.

Semble.—Communications between a prosecutor in a criminal case and his attorney, and between the attorney and his clerk, with respect to the case, are not privileged.

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SPECIAL APPEAL—*Act VIII of*

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lies from a regular appeal from an
decree passed in a suit of a nature cognizable by a Small Cause Court, though the suit was instituted before the
Act XLIII of 1860.

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1860—*Act XXIII of 1861, ss. 27 & 44.*] No special appeal lies in a suit of a nature cognizable by a Small Cause Court, although the suit may have been instituted before *Act XXIII of 1861* came into operation.

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—*Appeal to Privy Council—Practice*] Where a case has been heard by the High Court on special appeal, and on appeal to the Privy Council it is desired to include in the appeal the decisions of the lower Courts on the facts, an application for special leave to do so should be made previous to the hearing. The Judicial Committee will not, as a rule, allow a petition of appeal from those decisions to be put in at the hearing, *tunc pro tunc*.

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"Tenure," *Meaning of—Regs. VII of 1799 & VIII of 1819—Beng. Act VIII of 1865, s. 6—Non-registration.* By the word "tenure," as used in s. 105, Act X of 1859, is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and it is the latter which is sold on a sale under s. 105.

Therefore, where A, at a sale in execution of a decree for debt, bought the right, title, and interest of the holder of a transferable under-tenure, and previous to the confirmation of such sale the zemindar sued the tenant for arrears of rent, and obtained a decree under which he sold the tenure to persons who conveyed it to B, and A under the circumstances neither registered the transfer to himself, nor made any deposit of rent as allowed by s. 6, Beng. Act VIII of 1865, *Held*, that he was not entitled to recover possession from B.

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or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And as a first charge on the net income of the real property (after satisfying the expenses of establishments), the testator directed the trustees to pay Rs. 30,000 per annum to the person for the time being entitled to the beneficial enjoyment of the real property or the surplus income thereof. He further directed them, after all the annuities and legacies had fallen in and been satisfied, to convey the real estate, so far as the then condition of circumstances would permit, unto and to the use of the person entitled, under the limitations contained in the will, to the beneficial interest therein. The first limitation was to *J. M. T.* for life. At the end of the limitations of the real estate, the will contained the following proviso:—

"Provided always, and I hereby declare that, if any devisee, or tenant-for-life . . . shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakhana* house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or then, and immediately thereupon, the devise and limitations in my will contained and declared shall wholly cease as to him, and the person next in succession to the limitations aforesaid shall at once succeed," as if the committing breach of such conditions had then died.

The testator died in August 1868. In

G. M. T. instituted a suit for the purpose

aside the trusts and limitations of the

were for payment of debts, legacies,

dismissed on the 1st of April 1889.

1st September 1869 the Appeal

lately entitled to the personal

of debts, legacies, and

defendant *J. M. T.*

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attend at the *baiithakhana* daily for the transaction of business. In November 1869, *J M T* quarrelled with his two-trustees, and ceased to go to the *baiithakhana*. In April 1870, he demanded from the other trustees that possession of the *baiithakhana* should be given to him, and upon their insisting on the right to occupy the portion of the *baiithakhana* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession; and the trustees were ordered to deliver to him possession of the *baiithakhana*, except the portion of the ground-floor occupied for the business of the estate. After obtaining his decree, *J M T* found that the *baiithakhana* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J M T*, in December 1870, brought a suit to compel them to effect necessary repairs: the trustees contested the suit, but in March 1872 a decree was made directing them to make the repairs. Subsequently repairs were begun which were completed in October 1872.

J M T alleging that *J M T* had committed a breach of more of the conditions contained in the proviso for his residing in the *baiithakhana* house and by neglecting to repair, and had thereby incurred a forfeiture of the house, was entitled to take advantage:

The clause containing the provisions for cesser and forfeiture was intended to come into operation as a condition, and, therefore, that until *J M T* came into possession of the life-estate given him by the will, he became entitled to the surplus rents, and that clause was intended to apply. It was held that such time had arrived, the right of *J M T*, under the will, to the house and premises, was given to the clause of forfeiture, and that any action by the trustees against the right of

into full beneficial enjoyment
will, or at all events until
the time had not arrived when

Held further, that, assuming
action of the plaintiff in contesting
will, to occupy the *baitthakhana* from
him from claiming that effect should be given
forfeiture for non-residence. Even apart from
plaintiff, the conduct of the trustees in dispossessing
J M T to possession of a portion of the *baitthak*
refusing to repair, would suspend the operation of the
clause until October 1872, inasmuch as it prevented him at that
time from obtaining such a possession as was contemplated by the
forfeiture clause. The forfeiture clause was not brought into
operation by the judgment and order of the Judicial Committee of
9th August 1872.

Held, on the evidence, that *J M T* had complied with the condi-
tions as to residence.

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See COURT FEES ACT, SCHEDULE

———, CONSTRUCTION OF

See ARMENIAN WILL.

——— *Proviso for Cesser—Condition—Conditional L*

Breach of Condition.] *P C T*, a Hindu, died leaving an
G M T, and having first made his will in English, whereby,
declaring that he had already made sufficient provision for his
G M T, and that *G M T* was to take nothing, under the will,
he gave all his property to trustees, upon trust, as to the
personal estate, "to collect and get in the same" with certain
specified exceptions, and thereout to pay his funeral expenses and
debts "and such legacies as were not by the will postponed in pay-
ment;" and to invest the residue, and out of the annual proceeds
of such investments, so far as the same would extend, to pay
certain annuities and postponed legacies as they became due, and to
pay such surplus income as might from time to time exist, to the
person entitled to the beneficial enjoyment of the real property
or the surplus rents or profits thereof; with an ultimate trust, after
all the legacies and annuities had been satisfied, for the person or
persons entitled to the beneficial enjoyment of the real property.
And as to the realty, upon trust, until all the debts and legacies
had been paid, and all the annuities had fallen in, to receive the
rents, and thereout in the first instance to pay the unsatisfied
legacies and annuities, and to pay the surplus rents to the person

the person com-

December 1868, his son of avoiding and setting his will, except so far as they and annuities. This suit was *G M T* appealed, and on the Court declared him to be absolutely, subject to the trusts for payment annuities, and entitled on the death of the, the tenant-for-life, to the realty. *J M T* and under the limitations in the will appealed to the; and *G M T* filed a cross-appeal in which he claimed gift of the life-estate to *J M T* ought to be declared void. order of Her Majesty in Council, which was dated the 9th August 1872, and which arrived in Calcutta in September 1872, the limitations after the limitation to *J M T* were declared void and inoperative, and it was further declared that *J M T* was beneficially entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made, and to the provisions in the will not thereby declared to be void; and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the net rents of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that, upon the failure or determination of *J M T*'s life-interest, *G M T* was entitled as heir-at-law to the real and personal property. The proviso for ceaser was not among the provisions of the will which were declared void. *J M T* was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *baitukhana* house: and *J M T*, who had a family dwelling-house of his own, used, up to November 1869, to